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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

DELTA AIR LINES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

An arbitrator acting under a collective bargaining agreement determined that an air line pilot's misconduct (operating a commercial airliner while under the influence of alcohol) did not constitute "just cause" for discharge, despite its obvious seriousness, because of various mitigating circumstances, including the pilot's subsequent successful treatment for alcoholism and recertification by the Federal Aviation Administration. The Court below refused to enforce the arbitration award on the ground that the pilot's misconduct violated public policy as defined in *United Paperworkers International Union v. Misco, Inc.*, 108 S. Ct. 364 (1987), even though there is no public policy requiring discharge in such cases. The court also held that the arbitration panel exceeded its authority by considering the pilot's post-discharge treatment and recertification.

The questions presented are:

1. Did the court below, by applying the *Misco* standard to the employee's misconduct rather than the arbitrator's decision concerning the appropriate penalty, misconstrue *Misco* and substitute its judgment for that of the arbitrator in violation of the principles set forth in *Steelworkers Trilogy*?

2. Did the court also err by holding that the arbitration panel exceeded its authority in considering events occurring after the discharge in determining the issue of just cause?

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Petitioner,

v.

DELTA AIR LINES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Air Line Pilots Association, International ("ALPA"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals has been officially reported at 861 F.2d 665 (11th Cir. 1988) and is reprinted at App. 1a-20a. The court of appeals' denial of rehearing in banc is unreported and reprinted at App. 79a-80a. The decision of the district court is officially reported at 686 F. Supp. 1573 (N.D. Ga. 1987) and is reprinted at App. 21a-37a. The arbitration decision and award is not reported and is reprinted at App. 38a-76a.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1988. Thereafter, on January 23, 1989, the court of appeals denied a petition for rehearing. On

April 13, 1989, Justice Kennedy signed an order extending the time for filing the petition for certiorari to and including May 24, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTES

The issues in this case arise within the framework of provisions of both the Railway Labor Act ("RLA"), 45 U.S.C. §§ 153 and 184, and the Federal Aviation Regulations, 14 C.F.R. § 91.11; 14 C.F.R. § 67.19. These provisions are reprinted at App. 81a-96a.

STATEMENT OF THE CASE

1. *Captain Day's Discharge*

On January 10, 1985, Captain William D. Day served as Pilot-in-Command of a Delta Air Lines' passenger jet from Bangor, Maine to Boston. Although the flight arrived without incident, after the aircraft landed Delta learned that Captain Day had piloted the plane while intoxicated. After further investigation Delta terminated Captain Day for violating Company rules and Federal Aviation Agency (FAA) regulations prohibiting the consumption of alcohol within twenty four hours of a flight and for reporting for duty and operating a flight while under the influence. (App. 2a; 39a-40a). At the time of his discharge, Captain Day had been a pilot for Delta for nineteen years with an unblemished disciplinary record. (App. 41a; 73a-74a).

Shortly after his termination, Captain Day sought several medical evaluations and was diagnosed as an alcoholic. (App. 56a-57a). On March 21, 1985, he entered a treatment program at South Miami Hospital, which included 28 days as an in-patient followed by "aftercare" as an out-patient. By December 2, 1985, he had progressed to the point where his physicians concluded that he was ready to return to flying status. (App. 63a-64a).

On January 16, 1986, the FAA determined that he was eligible to return to flight duty under a "special issu[ance] medical certificate." [1] (App. 66a).

2. *The System Board Award*

As required by Section 204 of the RLA, 45 U.S.C. § 184, the applicable collective bargaining agreement established a System Board of Adjustment to resolve "disputes between any pilot covered by this Agreement and the Company growing out of grievances or out of interpretation or application of any of the terms of this Agreement." (App. 28a). Captain Day submitted a grievance concerning his discharge, which in due course was presented to a System Board comprised of two members appointed by Delta, two by ALPA, and a neutral Chairman. The issue before the Board was "solely to determine whether, in grievant's specific case, there was just cause for his discharge." (App. 74a).

On January 31, 1987, the Board, with the two Delta members dissenting, issued a thirty-five page decision and award concluding that Captain Day's discharge was not for just cause, and that a lesser penalty should be imposed. The Board's conclusion rested on four grounds: (1) Captain Day had an unblemished record of nineteen years service with Delta; (2) the uncontradicted medical evidence demonstrated that he flew while intoxicated be-

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[1] FAA regulations permit the Federal Air Surgeon to grant a special issuance medical certificate to a rehabilitated alcoholic pilot upon a showing that he can perform his duties as a pilot without endangering air safety. 14 C.F.R. § 67.19. The "special issuance" granted to Captain Day required him to be monitored by a supervisor designated by his employer and a trained pilot representative, both of whom had to submit monthly reports attesting to his continued total abstinence from alcohol. In addition, Captain Day was required to keep up his "aftercare" program and to submit quarterly progress reports from his treatment clinic. He also had to submit a yearly evaluation by a psychiatrist designated by the FAA as well as periodic blood tests.

cause he was an undiagnosed alcoholic who "succumbed to his disease of alcoholism on January 9 and 10" (App. 67a), but who thereafter was successfully treated so as to be deemed eligible for recertification by the FAA; (3) the two pilot crew members who failed to prevent Captain Day from flying were equally guilty under Company policy but were not discharged; and (4) Captain Day had been disparately treated by Delta in the application of the Company's alcohol policies because at least three other pilots who had reported for duty under the influence had not been terminated but had instead been permitted to enter Delta's alcohol rehabilitation program.[2] (App. 52a-54a).

Although recognizing that Captain Day's misconduct was "serious," the Board reasoned that he should have been offered the option of enrolling in the Company's alcohol rehabilitation program and ordered that he be reinstated, but without backpay or other retroactive benefits. Delta was also ordered to cooperate with the FAA in its recertification of Captain Day and to reimburse Captain Day for the costs of his alcohol rehabilitation program as though he had been offered the option of enrolling in it. (App. 6a; 74a).[3]

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[2] A fourth pilot who performed preflight duties but was intercepted after a mechanical problem delayed the flight was reinstated by a unanimous System Board. (App. 59a-60a). In addition, Delta had returned over 100 reformed alcholic pilots to the cockpit since 1986.

[3] After Delta refused to comply with the award, Captain Day obtained employment with another carrier, Amerijet International where he has served as Pilot-in-Command of a Boeing 727 since February 1987. In May 1988, he was promoted to Chief Pilot and is responsible for the training and supervision of sixty pilots. In January 1989, the FAA determined that Captain Day was eligible for an unconditional first class medical certificate, *i.e.*, without monitoring.

3. *The Decisions Below*

On February 12, 1987, Delta filed a complaint in the district court to set aside the arbitration award. The district court vacated the award on September 30, 1987, on the ground that it violated public policy. This decision was issued prior to this Court's decision in *United Paperworkers International Union v. Misco, Inc.*, 108 S. Ct. 364 (1987).

The court of appeals affirmed, concluding that *Misco* was distinguishable. The court noted that the employee's wrongdoing in *Misco* "was unrelated to his employment duties." (App. 9a). Accordingly, the court reasoned that the pertinent public policy question is whether there is a "public policy condemn[ing] the performance of employment activities in the manner engaged in by the employee." (App. 13a).

After reviewing state and federal laws prohibiting flying an airplane while under the influence of alcohol, the court concluded that "there is a well defined and explicit public policy against the operation of an aircraft while intoxicated." Because the public policy was "inextricably related to the performance of employment duties," the court found that the arbitration award reinstating Captain Day violated public policy:

> Delta . . . was under a duty to prevent the wrongdoing of which its Pilot-In-Command was guilty, and it could not agree to arbitrate that issue.
>
> The collective bargaining agreement between Delta and the ALPA, as interpreted by the System Board, insofar as it would submit to arbitration the question of whether Delta should authorize operation of aircraft by pilots under the influence of alcohol, violates public policy and cannot be enforced.

(App. 19a).

The court also held that the System Board was precluded from considering Captain Day's diagnosis of al-

coholism and his subsequent rehabilitation in mitigation of the punishment. Rather, the arbitrator was "limited to whether Delta had just cause to discharge Day, after he had flown an airplane while drunk, and before he had given the airline any indication that he was an alcoholic." (App. 19a).

REASONS FOR GRANTING THE WRIT

The decision below is a classic example of a court's substitution of its judgment for an arbitrator's under the guise of public policy. The decision is in direct conflict with the decision of another circuit on virtually identical facts, and is part of a broader pattern of conflicting interpretations in the lower courts of the scope of the public policy exception even after this Court's decision in *Misco*. A further clarification of the circumstances in which courts may set aside arbitration awards on public policy grounds is necessary to halt the continuing erosion of the doctrine of finality of arbitration awards.

I. THERE IS A DIRECT CONFLICT IN THE COURTS OF APPEALS CONCERNING THE CIRCUMSTANCES IN WHICH A LABOR ARBITRATION AWARD MAY BE VACATED ON GROUNDS OF PUBLIC POLICY

First in *W.R. Grace & Co. v. Local 759, International Union of United Rubber Workers*, 461 U.S. 757 (1983), and four years later in *Misco*, this Court defined in the narrowest of terms the circumstances in which a labor arbitration award may be set aside as violative of public policy. The award must violate "some explicit public policy" that is "well defined and dominant," and that can be "ascertained by 'reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *W.R. Grace*, 461 U.S. at 766; *Misco*, 108 S. Ct. at 373, quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945). A court's own concept

of public policy, even if "firmly rooted in common sense," cannot justify setting aside "an arbitration award that was entered in accordance with a valid collective-bargaining agreement." *Misco*, 108 S. Ct. at 374.

Despite these decisions, the courts of appeals continue to be divided concerning the circumstances under which an award may be vacated as contrary to public policy.[4] Some courts read *Misco* to hold that an arbitration award may not be set aside unless there is a direct conflict between the award itself and public policy. *See e.g., United States Postal Service v. National Ass'n of Letter Carriers*, 839 F.2d 146 (3d Cir. 1988) (public policy of protecting coworkers from employee violence did not require discharge of postal employee who fired shots into supervisor's empty vehicle). Other circuits, like the Eleventh Circuit here, continue to vacate arbitration awards requiring reinstatement of an employee even if there is no conflict between public policy and the award, if they find that the employee's misconduct which was at issue in the case violates public policy. *See Iowa Elec. Light & Power v. Local Union 204 Int'l Bhd. of Elec. Workers*, 834 F.2d 1424, 1427 (8th Cir. 1987) (award reinstating employee who intentionally violated interlock

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[4] In *Misco*, this Court granted certiorari "[b]ecause the Courts of Appeals [were] divided on the question of when courts may set aside arbitration awards as contravening public policy." 108 S. Ct. at 369 n.7 (collecting cases). The Court, however, did not reach the issue of whether a court may vacate an award only when it violates positive law or compels unlawful conduct. 108 S. Ct. 374 n.12. Two weeks after *Misco* was decided the Court granted certiorari in *United States Postal Service v. National Association of Letter Carriers*, 810 F.2d 1239 (D.C. Cir.) (per curiam), *cert. granted*, 108 S. Ct. 500 (1987) on the question of "should [an] arbitration award ordering Postal Service to reinstate employee who has been discharged for, and criminally convicted of, failing to deliver thousands of pieces of mail be set aside as contrary to public policy." *See* 56 U.S.L.W. 3410, No. 87-59 (Dec. 14, 1987). After oral argument the Court dismissed the petition as improvidently granted. *See* 108 S. Ct. 1589 (1988).

device in nuclear power plant set aside because employee's conduct violated public policy); *Stead Motors v. Automotive Machinists Lodge 1173*, 843 F.2d 357 (9th Cir.), *reh'g granted*, 857 F.2d 686 (1988) (award reinstating employee who failed to tighten lug bolts on car set aside because employee's conduct violates public policy).

The most direct and dramatic conflict is between the decision of the Eleventh Circuit in the present case and the decision of the District of Columbia Circuit in *Northwest Airlines, Inc. v. Air Line Pilots Association*, 808 F.2d 76, 83 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1751 (1988). Both cases involved pilots who, while suffering from alcoholism, had operated aircraft while intoxicated. In *Northwest Airlines*, the court of appeals held that no public policy was violated by an arbitration award which would restore the pilot to service after he had been successfully treated for his alcoholism as determined by the FAA. The court dismissed the public policy argument as "meritless" because "the [System] Board's decision merely required Northwest to reinstate Morrison if and when he was recertified by the FAA as fully fit and licensed to fly." The court reasoned that:

> To suggest that the Board's award violates public policy is to contend that the FAA was derelict in its responsibilities in considering Morrison for recertification. Obviously, it would be patently absurd for us, under the guise of 'public policy,' to reverse an arbitration award that is expressly limited by deference to the ultimate judgment of the agency that is charged with the enforcement of the public policy here at issue. . . . It would be the height of judicial chutzpah for us to second-guess the present judgment of the FAA recertifying Morrison for flight duty.

Id. at 83.

The Eleventh Circuit in this case did precisely what the D.C. Circuit in *Northwest* refused to do: it held that

because the pilot's conduct violated public policy—a matter about which no one disagrees—the arbitrator's determination that discharge was not the appropriate penalty likewise violated public policy. We believe that the D.C. Circuit's analysis of the issue is persuasive and the result it reached is correct.[5] Certiorari should be granted, however, not just to reverse an erroneous decision by the Eleventh Circuit, but, more importantly, to resolve the conflict between the circuits on the public policy question.

II. THE ELEVENTH CIRCUIT'S DECISION UNDERMINES THE RULE OF JUDICIAL NONINTERFERENCE WITH LABOR ARBITRATION

Since the *Steelworkers Trilogy*[6] it has been a settled principle of labor law that judges lack the authority to set aside an arbitrator's award because they disagree with the arbitrator's reasoning or his resolution of the dispute. *Misco*, though continuing to recognize the public policy exception to this rule articulated in *W.R. Grace*, nonetheless made clear that the exception would not be permitted to swallow the rule. The *Misco* opinion especially cautioned against using the public policy exception to overrule the arbitrator's determination concerning the appointment of the penalty:

> Even if it were open to the Court of Appeals to have found a violation of . . . [the Company's rules] because of the marijuana found in Cooper's car, the

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[5] The only conceivable public policy issue that could be presented by the award in either case is whether reinstatement might create too great a risk that the pilot might again fly while intoxicated. That issue, however, was eliminated by the arbitrators' findings in both cases that the pilots' misconduct was the result of alcoholism, and by the FAA's determination that the pilots had been successfully treated and were eligible for recertification.

[6] *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navig. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960).

> question remains whether the court could properly set aside the award because in its view discharge was the correct remedy. Normally, an arbitrator is authorized to disagree with the sanction imposed for employee misconduct. In *Enterprise Wheel*, for example, the arbitrator reduced the discipline from discharge to a 10-day suspension. The Court of Appeals refused to enforce the award, but we reversed, explaining that though the arbitrator's decision must draw its essence from the agreement, he "is to bring his informed judgment to bear in order to reach a fair solution of a problem. *This is especially true when it comes to formulating remedies.*" 363 U.S. at 597, 80 S. Ct. at 1361 . . . .

Misco, 108 S. Ct. at 372 (emphasis as in original).

The decision below disregards the limitations upon the public policy exception set forth by the Court in *Misco* and, if permitted to stand, significantly weakens the *Trilogy*. In the Eleventh Circuit's view, all that is required to set aside an arbitrator's award reducing a discharge penalty is a showing, not that an explicit public policy mandates the discharge, but only that the misconduct for which the penalty was imposed violates a work-related public policy. A deliveryman who gets a parking ticket, a truckdriver who is cited for going ten miles over the speed limit, a pilot who engages in nonessential conversation in the cockpit in violation of 14 C.F.R. § 121.542 (or, for that matter, violates any other FAA regulation)—all would be subject to discharge on public policy grounds. The Ninth Circuit has gone even a step further in *Stead Motors*, implying that public policy can be used to sustain the discharge of any employee who creates a safety hazard by failing to do his job properly.

In short, so many work-related acts or omissions can be deemed violative of public policy that the Eleventh Circuit's standard is really no standard at all. "[T]here are no limiting principles once a court chooses to look

past the legality of the arbitrator's award to the nature of the underlying conduct at issue." Edwards, *Judicial Review of Labor Arbitration Awards: The Clash Between the Public Policy Exception and the Duty to Bargain*, 64 Chicago-Kent L. Rev. 3, 22 (1988). Hence, "[i]n the proverbial next case, only the court will know whether the arbitrator's award violated public policy." *Id.*[7]

III. CERTIORARI SHOULD ALSO BE GRANTED TO REVIEW THE LOWER COURT'S HOLDING THAT THE ARBITRATOR WAS PRECLUDED FROM CONSIDERING POST-DISCHARGE EVENTS

Further warranting review by this Court is the holding by the court below that the arbitrator could not consider events occurring after Captain Day's discharge—specifically, his diagnosis of alcoholism, treatment for the disease, and subsequent rehabilitation—in determining whether discharge was the appropriate penalty for his misconduct. The Eleventh Circuit relied in this regard on its earlier decision in *Butterkrust Bakeries v. Bakery Workers International Union*, 726 F.2d 698 (11th Cir. 1984), which it described as "hold[ing] that an arbitrator is bound to decide just cause for discharge, *vel non*, at the time of discharge." (App. 8a).

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[7] The principle of judicial noninterference with labor arbitration applies with special force under the Railway Labor Act. The Act explicitly limits judicial review to three specific grounds: (1) failure of the Board to comply with the requirements of the Act; (2) failure of the Board to conform, or confine, itself to matters within the ecope of its jurisdiction; and (3) fraud or corruption. 45 U.S.C. § 153 First (q). The Fifth Circuit aptly characterized this scope of judicial review as "among the narrowest known to law." *Diamond v. Terminal Railway Ala. State Docks*, 421 F.2d 228, 233 (5th Cir. 1970). This Court later cited that characterization with approval in emphasizing that the standard of review language "means just what it says." *Union Pac. Ry. v. Sheehan*, 439 U.S. 89, 93 (1978).

Contrary to the Eleventh Circuit, arbitrators routinely consider post-discharge events in mitigation of an employee's misconduct. *See* F. Elkouri and E. Elkouri, *How Arbitration Works* 675-677 (4th ed. 1985). Especially in cases where the employee's misconduct is found to have been the result of alcoholism, arbitrators have explicitly recognized not only that alcoholism is an illness rather than willful misconduct, but also that rehabilitative efforts after discharge should be considered as mitigating. *See* T. Denenberg & R. Denenberg, *Alcohol and Drugs, Issues in the Workplace* 4, 15-16 (BNA) (1983). The Eleventh Circuit's view that this is improper arbitral practice is in direct conflict with the view of other circuits.[8]

The Eleventh Circuit's view is also out of step with *Misco*. To be sure, in *Misco* the arbitrator's refusal to permit an employer to justify a discharge on the basis of the employee's post-discharge conduct was sustained. The Court's rationale, however, was not that the law requires an arbitrator to reject as irrelevant "after-discovered evidence," but rather that it is up to the arbitrator, not a reviewing court, to determine whether and to what extent such evidence will be considered. 108 S. Ct. at 371. As the Court made clear, although "arbitrators often, but not always, confine their considerations to the facts known to the employer at the time of discharge," this is one of those "procedural" determinations

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[8] Arbitration awards finding mitigating circumstances on the basis of post-discharge events have been upheld in the following cases: *United States Postal Service v. National Association of Letter Carriers*, 839 F.2d 146 (3d Cir. 1988) (employee's post-discharge conduct demonstrated no propensity to repeat previous misconduct); *Northwest Airlines v. Air Line Pilots Ass'n*, 808 F.2d 76 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1751 (1988) (pilot's post-discharge diagnosis of alcoholism and subsequent rehabilitation); *United States Postal Service v. National Association of Letter Carriers*, 810 F.2d 1239 (D.C. Cir. 1987) (post-discharge attendance at "Gamblers' Anonymous" and cessation of gambling).

which is within the arbitrator's discretion to make. *Id.* at 371 n. 8, 371-372. *See John T. Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964).

Like its expansive reading of the public policy exception, the Eleventh Circuit's limitation on arbitral discretion should not be left standing by this Court because it, too, dangerously undercuts the longstanding rule of judicial noninterference with labor arbitration.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: May 24, 1989

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 87-8839

DELTA AIR LINES, INC.,
Plaintiff-Counter-Claimant,
Defendant-Appellee,
Cross-Appellant,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Defendant-Counter-Claimant,
Plaintiff-Appellant,
Cross-Appellee.

Appeals from the United States District Court
for the Northern District of Georgia

Dec. 8, 1988

Before HILL and FAY, Circuit Judges and DUBINA*, District Judge.

HILL, Circuit Judge.

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* Honorable Joel F. Dubina, U.S. District Judge for the Middle District of Alabama, sitting by designation.

I. FACTS

This case concerns the discharge of William D. Day, a former Delta Airlines pilot, who was discharged by Delta for operating an aircraft while drunk. The facts, which were established at Day's grievance hearing before the Delta System Board of Adjustment, are not in dispute.

On January 9, 1985, Day was the Pilot-In-Command of Flight 410 from Boston to Bangor, Maine, which arrived about 2:00 p.m. The other cockpit crew members were First Officer David Rothbart and Second Officer Peter V. Voorhees. The four flight attendants (F/A's) were Robin Surette, Maureen Dion, Linda Rehal and Debbie Kleibech. The crew had a scheduled layover at the Bangor Holiday Inn. Flight 437 to Boston departed at 7:05 a.m. on January 10. This same crew was to operate that flight.

Before dinner on the evening of January 9, Day met some of the other crew members in the lounge of the hotel and drank three beers. The three pilots, two of the F/A's and Angela Miller (a friend of Voorhees) then went to dinner, where they shared three carafes of wine. After dinner, the group returned to the lounge for a "nightcap." Day and Miller remained in the lounge to finish their drinks after the others had left. A stranger at the next table offered to buy Day a drink; Day accepted and consumed more alcohol. Although Day maintains that he "blacked out" around 10:00 p.m. on January 9, he acknowledges that he must have changed his beverage of preference to scotch whiskey later in the evening. Bar bills indicate that Day continued to drink scotch until 12:30 a.m. The next thing Day remembers is his alarm clock sounding at 5:15 a.m. January 10. Rothbart knocked on Day's door around 6:15 a.m., but Day told him to go on to the airport without him. Testimony of F/A's Surette, Dion and Rehal establish that Rothbart, upon returning from Day's room, told the

other crew members, "We're going without him. He's still out cold."

Day eventually made his way to the airport and entered the aircraft shortly before departure and just as the last passenger was boarding. His fellow flight deck officers did not interfere with his boarding; moreover, Day was supported by Rothbart as he entered the aircraft. His face was very red; his eyes were glassed over; and he appeared to be very disoriented. F/A Surette smelled liquor on Day's breath as be passed by her. F/A Rehal testified that after observing Day's difficulty in getting into his cockpit seat, she said to F/A Dion, "He's drunk."

The cockpit door was immediately closed and locked. F/A Surette knocked on the cockpit door, attempting to see if Day was too drunk to fly the airplane. Voorhees opened the door, but stood in the doorway blocking Surette's view. Upon questioning by Surette, Voorhees replied, "Everything is fine." Noticing F/A Rehal, Voorhees said, "The blonde doesn't look convinced." Surette answered, "She's not, and neither am I."

Nevertheless the flight departed Bangor with Day as Pilot-In-Command. The aircraft, a Boeing-727, was filled with passengers. All of the flight deck crew members testified that Day flew the aircraft the entire trip. After reaching cruise altitude, Voorhees walked back to the galley and obtained coffee to carry to the flight deck. F/A Surette told Voorhees that the F/A's believed that Day was drunk, but he again replied that everything was all right. Upon his return to the cockpit, Voorhees wrote a note to Rothbart stating, "We got trouble with the F/A's." Rothbart, upon reading the note, instructed Voorhees to disconnect the cockpit voice recorder, which he did. This was a direct violation of Federal Aviation Regulations. While the recorder was disconnected, the pilots discussed the problem presented by there being

F/A's who were perceived as being disagreeable because their Pilot-In-Command was drunk. After about five minutes, they reconnected the recorder.

Flight 437 did arrive and land at Boston. Thereupon, the F/A's reported to Chief Pilot James Baker that Day was drunk while flying the aircraft. At the same time, the passenger who had been last to board and who had also believed Day was drunk, reported his observations to a Delta Customer Service Manager, who, in turn, gave the information to Baker.

Captain Baker called the pilot crew into his office and promptly concluded that Day's appearance and behavior indicated Day was drunk. All three pilots were given blood alcohol tests. No alcohol was detected in the blood of either Rothbart or Voorhees. However, Day's blood contained alcohol. Expert analysis demonstrated that, given time for the alcohol to dissipate, Day had a blood alcohol content of approximately .13 grams at the time he flew the aircraft.[1] Day was discharged on January 15, 1985. Prior to his discharge, Day made no attempt to enroll in an alcohol rehabilitation program operated by Delta or any other such program, though he had experienced other incidents of blackouts from drinking.[2]

The Federal Aviation Administration (FAA), by regulation, forbids the operation of *any* aircraft while drunk. Federal Aviation Regulations provide:

§ 91.11 Liquor and Drugs

(a) No person may act as a crew member of a civil aircraft—

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[1] In Massachusetts, .1 gram is presumptive of operating an automobile under the influence of alcohol. Mass.Gen.Laws Ann. ch. 90 § 24(1)(e).

[2] Only after Delta denied Day's discharge grievance did Day seek evaluation concerning his alcoholic tendencies. Day was diagnosed an alcoholic and entered in-patient treatment in March 1985.

> (1) within 8 hours after the consumption of any alcoholic beverage;
>
> (2) while under the influence of alcohol;
>
> (3) while using any drug that affects the person's faculties in any way contrary to safety.

Delta forbids such conduct. Its *Flight Operations Procedures Manual*, Section 3, page 11 (10-12-84) states:

> USE OF ALCOHOL OR OTHER DRUGS
>
> Use of intoxicating beverages, including wines and beer, by flight crew members while in uniform or within 24 hours prior to departure of a flight is prohibited.
>
> The excessive use of intoxicants or drugs by any flight crew member, regardless of the above limitations, constitutes cause for discharge.
>
> Any evidence of the use of alcohol or other drugs which is apparent at the time of reporting for flight duty, also constitutes reason for discharge.
>
> Any flight crew member who knowingly permits another flight crew member to attempt to perform his flight duty while under the influence of intoxicants or drugs shall be considered equally guilty.

Day was discharged for violating both the Delta rules and the FAA Regulations.

Upon termination, Day submitted a grievance letter to Delta. The grievance was denied. The Air Line Pilots Association (ALPA), asserting that Day's flying of Flight 437 while drunk was not a sufficient cause for his discharge, submitted the dispute to the System Board.

In a confusing three-to-two opinion, a majority of the System Board found that, although Day had committed a dischargeable offense, there was no just cause for dis-

charge. According to the Board, Day should have been offered the option of entering the Delta alcohol rehabilitation program instead of being terminated. The Board determined that Delta, by firing Day, did not administer its alcohol rehabilitation program uniformly or fairly. This conclusion was based on the fact that, on at least three prior occasions, crew members who were apparently en route to reporting for duty while intoxicated, had been intercepted by fellow crew members or other Delta employees prior to take-off. These three, who had not served as crew members while drunk, were given the opportunity to enter Delta's rehabilitation program and/or given punishment less severe than discharge. In addition, the Board considered the fact that Voorhees and Rothbart were suspended rather than discharged. The majority also found it significant that, after discharge and after rejection of his grievance, Day was diagnosed as an alcoholic and had pursued a rehabilitation program with effective results.

After the finding of "dischargeable offense," the Board, nevertheless, concluded that the discharge was "without just cause although [Day] did commit serious misconduct." Day was awarded reinstatement, without back pay or related benefits, and Delta was ordered to pay for the costs of the alcohol rehabilitation program in which Day had participated. Delta was also ordered to cooperate with Day and with the FAA so that Day could be granted special issuance of a first-class airmen medical certificate.[3]

On February 12, 1987, Delta filed a complaint in the district court, seeking to have the arbitration award set aside. The district court overturned the decision of the System Board, except for that portion of the award requiring Delta to reimburse Day for the costs of his alco-

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[3] Day's pilot's license and medical certificate had been suspended by the FAA.

hol rehabilitation. The district court found that enforcement of the award finding no just cause for discharge would violate clearly established public policy against allowing pilots of airliners to operate aircraft while under the influence of alcohol. 686 F.Supp. 1573. The ALPA, arguing that Day's conduct was not just cause for discharge, filed a Notice of Appeal. Delta filed a Notice of Cross-Appeal concerning the order for reimbursement.

II. DISCUSSION

A. Scope of Review and Binding Authority

In deciding whether it was proper for the district court to overturn the arbitrator's decision, we note that

> [t]he function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. . . . The courts, therefore, have no business weighing the merits of the grievance.

United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564, 567-68, 80 S.Ct. 1343, 1346, 4 L.Ed.2d 1403 (1960). As long as the arbitrator's award "draws its essence from the collective bargaining agreement," and is not merely "his own brand of industrial justice," the award is legitimate. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424 (1960). However, we must also be aware that there are public policy considerations which may be applicable under the facts of a given case. *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 103 S.Ct. 2177, 76 L.Ed. 2d 298 (1983).

Our inquiry focuses on the three-to-two award of the Delta System Board of Adjustment. Examination of the award reveals an ambiguity in the several findings of

the majority. First, the majority found that Day "did commit a dischargeable offense." Then, in the following paragraph, they found that there was no just cause for Day's discharge. In addition, the majority stated, in a passage that might be taken as a disclaimer, that its opinion "should not be interpreted as expressing a judgment on the reasonableness of . . . [Delta's] policies relating to alcohol consumption and abuse."

Notwithstanding this ambiguity, because the award specifically states that there was no just cause for discharge, we take it, for purposes of this review, that the System Board majority found just that—no just cause—and that Delta's discharge of Day was improper. We review the award as such.

We are particularly bound and informed by three cases pertinent to the issue at hand: *United Paperworkers International Union v. Misco, Inc.*, —— U.S. ——, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987); *Florida Power Corp. v. International Brotherhood of Electrical Workers*, 847 F.2d 680 (11th Cir.1988); and *Butterkrust Bakeries v. Bakery, Confectionery and Tobacco Workers International Union*, 726 F.2d 698 (11th Cir.1984).

Butterkrust holds that an arbitrator is bound to decide just cause for discharge, *vel non*, at the time of discharge. The arbitrator's responsibility is discharged upon his determination of the existence of just cause. If this finding has been made, the arbitrator is not authorized to employ "his own brand of industrial justice" and decide what post discharge good works would entitle the properly discharged employee to rehire. While the arbitrator (or independent member of a split panel) may be an actual or potentially excellent personnel expert, his opinion as to what employment opportunities one ought to have if he or she, after discharge, constructively addresses the problems that led to discharge, is not pertinent to arbitration duties. The arbitrator's

effort to impose his views on that subject upon the parties to the arbitration amounts to his basing his decision upon "his own brand of industrial justice," which is forbidden.

Misco deals with the pubic policy exception to judicial deference to arbitration awards. *Misco* follows the principles of *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983) with respect to public policy:

> In *W.R. Grace*, we recognized that "a court may not enforce a collective-bargaining agreement that is contrary to public policy" . . . 461 U.S. at 766 [103 S.Ct. at 2183]. . . . We cautioned, however, that a court's refusal to enforce an arbitrator's *interpretation* of such contracts is limited to situations where the contract as interpreted would violate "some explicit public policy" that is "well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *Id* (quoting *Muschany v. United States*, 324 U.S. 49, 66, 65 S.Ct. 442, 451, 89 L.Ed. 744 (1945)) (emphasis in original text).

Misco, 108 S.Ct. at 373 (1987). In *Misco*, the employee was apprehended on company premises in an atmosphere of marijuana smoke in another's car, and traces of marijuana were found in his own car on the company lot. The *Misco* court found the reversal of the arbitration award improper because the employee's conduct was unrelated to his employment duties. As the Supreme Court pointed out, the Court of Appeals did not ascertain any "well defined and dominant" public policy violated by the arbitrator's interpretation of the contract to the effect that he may decide the question of whether the company can continue to employ an employee who was caught in a car with marijuana.

In *Florida Power*, although the panel did not discuss the public policy issue, the facts suggest that the discharge was for conduct not integral to employment duties. The employee in *Florida Power*, while off company property and off company time, was stopped and arrested for driving while intoxicated. A search of the employee's car revealed cocaine, drug paraphernalia and a concealed weapon. Upon learning of the employee's arrest, the company discharged the employee for violation of a recently adopted drug policy. The employee's arrest resulted from conduct unrelated to his employment duties, and for this reason, the panel applied *Misco*. The court did not find it necessary to discuss public policy considerations, it not appearing that there is any public policy against employing someone who sells drugs away from the employment premises. With respect to the scope of the arbitrator's authority, the panel merely followed the established precedent and decided that the arbitrator's award was drawn from the essence of the contract as required.

To summarize, we are instructed that our function in reviewing an arbitration award is very limited. While *W.R. Grace* makes it clear that we should reverse, if to affirm, we enforce an agreement contrary to public policy, *Misco* teaches that we must find such public policy from a more clear expression than our own notions of what it might, or should, be. In *Misco*, it was not shown that there existed explicit public policy forbidding the continued employment of an employee who consumed marijuana. We glean, inferentially, from *Florida Power* that, no matter how strong a public policy may condemn trafficking in drugs, Florida Power may, nevertheless, agree to arbitrate the issue as to whether a party might work for Florida Power, though guilty of such trafficking off the job.

These cases help define the public policy exception enunciated in *W.R. Grace*; none disapproves it. Such a doctrine exists, but examples of arbitration results that so

offend public policy that they should be set aside by a court are not readily to be found. This is not surprising. An arbitrator's result may be wrong; it may appear unsupported; it may appear poorly reasoned; it may appear foolish. Yet, it may not be subject to court interference. The offending arbitrator's award which properly results in our setting it aside must be so offensive that one is to be seen only rarely. Examples come to mind more readily than exist in the real world.

It can hardly be denied that public policy would forbid the enforcement of a contract submitting to arbitration whether a complaint to the EEOC of racial discrimination constitutes just cause for discharge. *See, e.g., Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998 (5th Cir.1969) (employee who was discharged for filing charges with EEOC must be reinstated); *Price v. Cannon Mills Co.*, 607 F.Supp. 1146 (D.C.N.C. 1985) (discharge of employee in retaliation for filing EEOC charges violates Title VII). Should an employer make such an assertion and an arbitrator find the assertion valid, the court should promptly set the award aside. With this background in mind, we review the award of the Delta System Board of Adjustment.

B. Public Policy

The issue before this court is whether the district court properly set aside the award of the System Board as contrary to public policy.

We agree with the district court that, in the case before us, we have the rare example of an award the enforcement of which would violate clearly established public policy which condemns the operation of passenger airliners by pilots who are under the influence of alcohol.

If this conclusion is correct, there must be some principled difference between this case and *Misco* and *Florida Power*. The difference is apparent.

The employee in *Misco* appears to have smoked marijuana in a car in the plant's parking lot. The employee in *Florida Power* was discovered to have drug paraphernalia in his automobile. In these cases, the apparent wrongdoing was serious and is seriously condemned. However, in deciding to commit the wrong, the wrongdoer was not making an employment decision. The employer, on the other hand, may reasonably have disliked furnishing employment to one who is committing such wrongs. Yet, should the employer decide to continue to employ such a wrongdoer, even though his actions are condemned by public policy, *that decision*—to continue employment—is not itself contrary to public policy. Furthermore, the wrongdoing by an employee can be ended without affecting his employment. The wrongdoing and the employment are parallel but not intertwined. The wrongful conduct is wrongful, in and of itself, and its lawfulness *vel non* does not depend in any way on the employment. If public policy is offended—as it seems to have been—the performance of employment duties has nothing to do with it.

The case before us is remarkedly different. Here, it is the employee *qua* employee who is the wrongdoer. It is Day's employment which made his intoxication violate law and public policy. Day could not correct his offensive conduct without altering the performance of his employment duties. He could not continue his offensive conduct and yet perform his employment duties legally. Furthermore, Delta could not permit Day to continue to perform his employment duties while his offensive conduct continued, without being an accessory to the wrongdoing.

As noted above, *Misco* requires the finding of a well defined public policy and an award that conflicts with that policy. The public policy of which the Supreme Court speaks in *Misco* seems to be a public policy not addressing the disfavored conduct, in the abstract, but disfavored conduct which is *integral to the performance*

of employment duties. The question we are instructed, by *Misco*, to ask is not, "Is there a public policy against the employee's conduct?", but, rather, "Does an established public policy condemn the performance of employment activities in the manner engaged in by the employee?" Such a policy does exist in this case; the arbitrator's finding of no just cause explicitly conflicts with that policy.

The case before us is the case *Misco* was talking about. The arbitrator has construed the collective bargaining agreement in such a manner that it appears that Delta has agreed to submit to arbitration the question as to whether it should authorize operation of aircraft by pilots while they are drunk. We must ascertain "by reference to the laws and legal precedent" whether there is some explicit public policy that is "well defined and dominant" which would prohibit Delta from entering into such a contract. In order to find out, we must look at what the people have done on this subject through their elected representatives.

1. *Laws and Legal Precedents*

With the advent of the automobile came the need for laws against drunk driving. The substitution of mechanical power for that of horses and mules, as well as the increased speed capability of the automobile, heightened the dangers of vehicular traffic. In response to this, the people, through their elected representatives, passed laws which made it a crime to drive an automobile while intoxicated. Today, it is universally accepted throughout the country that the operation of a motor vehicle while drunk is a crime.

Likewise, the advent of the airplane, and its three dimensions of movement and danger, produced a need for laws against drunk flying. Public policy against the operation of any vehicle while intoxicated promptly ex-

tended to that mode of travel as the people, again through their elected representatives, passed laws against the operation of aircraft while intoxicated. Today, laws prohibiting flying while intoxicated have been adopted in nearly every state, including Maine and Massachusetts from which and into which Day piloted Flight 437. These states include:

Alaska—Alaska Stat. § 02.30.030(a)

Arizona—Ariz.Rev.Stat. § 28-1744(B)

Arkansas—Ark.Code § 27-116-101

California—Cal.Pub.Util.Code § 21407.5

Connecticut—Conn.Gen.Stat. § 15-77

Florida—Fla.Stat.Ann. § 860.13(1)(a)

Hawaii—Hawaii Rev.Stat. § 263-11

Idaho—Idaho Code § 21-112

Illinois—Ill.Ann.Stat. ch. 15½ ¶ 22.43d

Indiana—Ind.Code § 8-21-4-8

Iowa—Iowa Code Ann. § 328.41

Kansas—Kan.Stat.Ann. § 3-1001

Kentucky—Ky.Rev.Stat. § 183.100

Louisiana—La.Rev.Stat.Ann. § 14:98(A)

Maine—Me.Rev.Stat.Ann. tit. 6, § 202(9)

Maryland—Md.Transp.Code Ann. § 5-1006(a)

Massachusetts—Mass.Gen.Laws. Ann. ch. 90 § 44

Michigan—Mich.Comp.Laws § 259.185

Minnesota—Minn.Stat.Ann. § 360.075

Mississippi—Miss.Code Ann. § 61-11-1

Montana—Mont.Code Ann. § 67-1-204(7)

Nebraska—Neb.Rev.Stat. § 28-1465

Nevada—Nev.Rev.Stat. § 493.130

New Hampshire—N.H.Rev.Stat.Ann. § 422:34(X)

New Jersey—N.J.Stat.Ann. § 6:1-18

New York—N.Y.Gen.Bus.Law § 245(7)

North Carolina—N.C.Gen.Stat. § 63-27

North Dakota—N.D.Cent.Code § 2-03-10(2)

Ohio—Ohio Rev.Code Ann. § 4561.15(c)

Oregon—Or.Rev.Stat. § 493.160

South Carolina—S.C.Code Ann. § 55-1-100(A)

South Dakota—S.D.Codified Laws § 50-13-17

Tennessee—Tenn.Code Ann. § 42-1-201

Texas—Tex.Rev.Civ.Stat.Ann. art. 46f-3

Vermont—Vt.Stat.Ann. tit. 5, § 187

Virginia—Va.Code § 5.1-13

Washington—Wash.Rev.Code Ann. § 47.-68.220

West Virginia—W.Va.Code § 29-2A-11

Wisconsin—Wis.Stat.Ann. § 114.09

Wyoming—Wyo.Stat.Ann. § 10-6-103

Not only have the state legislatures passed these laws, but the courts consistently upheld them. *See State ex rel. Schafer v. Fenton*, 104 Ariz. 160, 449 P.2d 939 (1969) (damage to airplane which defendant crashlanded was only an incident to offense of operating aircraft while intoxicated and was not so closely related to the offensive act as to bring into play misdemeanor compromise statute, such that defendant was not entitled to dismissal of information charging flying while intoxicated, though he settled with owner of aircraft for damage incurred in the crash); *State v. Bahl*, 242 N.W.2d 298 (Iowa, 1976) (defendant's conviction for manslaughter can result from operating a motor vehicle, including an aircraft, while intoxicated); *Ward v. State*, 280 Md. 485, 374 A.2d 1118 (1977) (statute making it a crime

to operate aircraft while intoxicated does not conflict with federal law which, while proscribing identical conduct, imposes civil, rather than criminal penalties; therefore, defendant's conviction under the statute upheld), *cert. denied*, *Ward v. Maryland*, 434 U.S. 1011, 98 S.Ct. 723, 54 L.Ed.2d 754 (1978); *Sanders v. State*, 96 Okl. Crim. 397, 256 P.2d 205 (1953) (where defendant pled guilty to charge of operating an aircraft while intoxicated, sentence which was not near the maximum was affirmed). It appears that, of those states where we find no specific statutory prohibitions, none allow operation of an aircraft while intoxicated. Instead, those states have general statutes which, properly construed, prohibit reckless or dangerous flying (for example, Alabama—Ala.Code § 4-2-10 and Delaware—Del. Code Ann. tit. 2, § 309), and these statutes appear to be used to penalize pilots who fly while intoxicated. On the federal level, FAA Regulations, to which we have referred, forbid piloting an aircraft while intoxicated. We emphasize that we have found no state that approves of operation of an aircraft while drunk.

In addition to state statutes and federal regulations, case law also helps define public policy. As earlier observed, it is not to be expected that an extensive body of case law has been, or will be, developed illustrating the setting aside of arbitration decisions offending public policy. Arbitrators are not prone to such extreme results. However, with the principles we have outlined in mind, we find precedential support in two cases. *National Labor Relations Board (N.L.R.B.) v. Dixie Motor Coach Corp.*, 128 F.2d 201 (5th Cir.1942) and *Iowa Electric Light and Power Co. v. Local Union 204 of the International Brotherhood of Electrical Workers*, 834 F.2d 1424 (8th Cir.1987).

In *Dixie Motor*, the issue before the court was whether there was sufficient evidence to support the award of the N.L.R.B. reinstating certain employees. One employee, a

bus driver, was discharged for his continued use of liquor. Witnesses testified that the driver frequently became intoxicated, and that on occasions he drove his bus on his regular run before he had fully recovered from a drinking spree. The Rules and Regulations of the Railroad Commission of Texas clearly forbade the operation of a motor bus by an operator who drinks intoxicating liquor either on or off duty. The court held that:

> [t]he public interest, as well as that of the employer, requires of any one entrusted with the lives and safety of the travelling public that he conduct himself in a manner in keeping with his responsibilities. . . . The undisputed facts show that this employee's drinking habits were such as to place upon his employer the duty to discharge him.

Id. at 203. The court found that reinstatement of an employee who drives drunk to a position of public service "would do violence to the public welfare and to the purposes of the National Labor Relations Act." *Id.* Thus, the court reversed the order reinstating him. Driving a bus while drunk, like flying an airplane while drunk, offends public policy in such a way that discharge must be justified, if not demanded. The driver's misconduct—driving while drunk—was inextricably related to the performance of his employment duties. Discharge was therefore authorized, and the employer's decision to discharge for such an offense was not subject to being set aside.

The arbitration award in *Iowa Electric* called for the reinstatement of a nuclear power plant machinist who had been discharged for deliberately violating important federally mandated safety regulations. The employee, in a rush to get to lunch early, deliberately ordered a foreman to pull a fuse on the interlock door system so that he could leave the secondary containment area. This door system is used as a measure to protect the public from exposure to harmful radiation. The district court va-

cated the arbitrator's award on public policy grounds, and the Eighth Circuit Court of Appeals affirmed.

The court found a "well defined and dominant" national policy requiring strict adherence to nuclear safety rules. The court then concluded that this strong public policy would be violated by judicial enforcement of an arbitrator's award requiring the reinstatement of an employee who had deliberately violated nuclear safety regulations. The employee's misconduct occurred in the midst of, and as a part of, the performance of employment duties, as did Day's, and discharge was found to be justified.

2. *Conflict with Public Policy*

In our investigation, we have not uncovered any statute, law, ordinance or court precedent to the effect that flying under the influence of alcohol is consistent with public policy. It may be remarkable to find in any field of public opinion and policy such unanimity and total absence of dissent.

The existence of public policy denouncing the operation of any aircraft, even those not occupied by passengers, while intoxicated is "explicit," "well defined and dominant," and "ascertained by reference to laws and legal precedents" we have here reviewed. When public policy is offended by what a person does, unrelated to the performance of his employment duties, an employer may well conclude that he should discharge that person as an expression of disapproval, though there be no public policy one way or the other. Where the person performs his employment duties and, *in doing so*, violates standards, restraints and restrictions on conduct, clearly and explicitly established by the people in their laws, a requirement that the employer suffer that malperformance and not discharge the offender does itself violate the same well established public policy. The public policy de

nouncing the operation of any aircraft while drunk addresses disfavored conduct which is inextricably related to the performance of employment duties, and thus fits within the limitations imposed by *Misco*. What Day did as performance of his employment is the very thing which offends public policy. He flew an airplane while drunk and endangered the lives of his passengers and crew.

While the employers in *Misco* and *Florida Power* may have *wished* to use the leverage of employment to vindicate public condemnation of marijuana smoking and drug dealing, neither was under a duty to do so. Delta, on the other hand, was under a duty to prevent the wrongdoing of which its Pilot-In-Command was guilty, and it could not agree to arbitrate that issue.

The collective bargaining agreement between Delta and the ALPA, as interpreted by the System Board, insofar as it would submit to arbitration the question of whether Delta should authorize operation of aircraft by pilots under the influence of alcohol, violates public policy and cannot be enforced. The award of the System Board, which would give effect to such an interpretation, cannot be enforced.

As the district court noted, we are not suggesting that an airline pilot may not be reinstated under different circumstances or that a discharged pilot cannot be rehabilitated and hired once again to fly. There is no public policy against rehiring former alcoholics, post-rehabilitation. However, the arbitrator in this case was not authorized to decide whether, having been rehabilitated, Day should be rehired. The arbitrator's decision in this case was limited to whether Delta had just cause to discharge Day, after he had flown an airplane while drunk, and before he had given the airline any indication that he was an alcoholic. The System Board's finding of no just cause falls within the public policy exception, as lim-

ited by *Misco*, and was properly set aside by the district court.

Finally, we must examine that portion of the district court's judgment which required Delta to reimburse Day for the expenses of his alcohol rehabilitation. As the district court noted, Day, although asserting his right to treatment in Delta's alcohol rehabilitation program well after discharge, made the claim the subject of his grievance. As such, the issue was properly before the System Board for determination. Given the factual conclusions reached by the Board regarding Day's entitlement to treatment in Delta's program, the district court held that requiring Delta to reimburse Day for the costs of private therapy did not exceed the arbitrator's authority. We agree. It may well be that the System Board would have come to another result on this issue had it reached what we hold was required on the principle issue, reinstatement. We do not speculate on that. Contrary to that which obtains vis-a-vis just cause for discharge, there are no public policy implications in paying for rehabilitation. Were we initial deciders, we should perhaps be guided by the fact that Day did not seek or request rehabilitation until after his discharge. We are not initial deciders. We end up where we started. "The courts, therefore, have no business weighing the merits of the grievance." *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. at 568, 80 S.Ct. at 1346. As to rehabilitation expense, there being no public policy implicated, we agree with the district court.

III. CONCLUSION

For the reasons stated above, the district court's order is

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil No. C87-239

DELTA AIR LINES, INC.

vs.

AIRLINE PILOTS ASSOCIATION

ORDER

[Filed Sept. 30, 1987]

This action seeking to overturn an arbitration award handed down pursuant to the provisions of the Railway Labor Act ("RLA") is before the court on cross motions for summary judgment.

This case concerns the discharge of William D. Day, a former Delta pilot, who was discharged by Delta for operating an aircraft while intoxicated. The facts underlying both parties' motions for summary judgment were established at Mr. Day's grievance hearing before the Delta System Board of Adjustment, ("the Board"), and are unchallenged.

On January 9, 1985, William D. Day served as the Pilot-in-Command of a flight which arrived in Bangor, Maine around 2:00 p.m. He and the crew were schedule to lay over in Bangor for the night then fly Delta Flight No. 437 from Bangor to Boston at 7:05 a.m. the next morning.

During that lay over, Day drank unknown quantities of scotch whiskey, as well as wine and beer, and became extremely intoxicated. At his hearing, Day indicated that he did not have a clear idea of how much alcohol he drank. He stated that he could not remember anything that happened after about 10:00 p.m.

The next morning Day was unable to get out of bed in time to leave for the airport with the rest of the crew. He arrived at the airport just prior to the scheduled departure. Witnesses indicated that another member of the cockpit crew, first officer David Rothbart, had to assist him on board the aircraft. At least one passenger and two flight attendants indicated their concern about Day's condition. His eyes were glazed, his face was red and swollen, and he smelled strongly of alcohol. One flight attendant knocked on the locked cockpit door to voice her objections to having a drunk fly the plane. The second officer, Peter Voorhees, opened the door slightly, and simply responded that everything was fine.

After takeoff, the second officer left the cockpit to get some coffee. One of the flight attendants told Voorhees that she knew the captain was drunk and that she hated him for putting the flight attendants in that position. Upon returning to the cockpit the second officer passed a note to the first officer stating, "We got trouble with the F/A's." Immediately thereafter, the cockpit voice recorder was deliberately disconnected, in direct violation of FAA regulations, while the crew discussed what to do about the flight attendants' concerns regarding Day's condition.

On arriving in Boston, one of the passengers contacted a Delta customer service supervisor and declared that the captain of the aircraft was intoxicated. The flight attendants went directly to Captain James Baker, Delta's chief pilot in Boston, and reported that Captain Day was drunk.

Realizing the seriousness of these accusations, Captain Baker met with Day in his office. He indicated that Day was moving slowly, that his speech was slurred, and that he looked drunk. Baker ordered Day and the first and second officers to submit to a blood alcohol test. The test results of the first and second officers were both negative. Captain Day's test indicated an alcohol content of .065 miligrams. Expert analysis indicated that given time for the alcohol to dissipate, at the time that Captain piloted Flight 437 from Bangor to Boston he had a blood alcohol content of around .13 grams.[1]

Under the Delta Flight Operations Procedures Manual,

> Use of intoxicating beverages, including wines and beer, by flight crew members while in uniform or within 24 hours prior to departure of a flight is prohibited. The excessive use of intoxicants or drugs by any flight crew members regardless of the above limitations, constitutes cause for discharge.
>
> Any evidence of the use of alcohol or other drugs which is apparent at the time of reporting for flight duty, also constitutes reason for discharge.

Federal aviation regulations specify that:

> No person may act as a crew member of a civil aircraft—
>
> 1. Within eight hours after the consumption of any alcoholic beverage
>
> 2. While under the influence of alcohol;
>
> 3. While using any drug that affects the person's faculties in any way contrary to safety; or
>
> 4. While having .04% by weight or more alcohol in the blood

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[1] In Georgia, .1 gram is presumptive of operating an automobile under the influence of alcohol.

Having clearly violated these rules by acting as pilot in command of a flight while drunk, Captain Day was terminated by Delta on January 15, 1985. The parties agree that Delta had no reason to know about Day's drinking problem before the incident occurred, and that he did not inform Delta that he thought he was an alcoholic until after his discharge. Nor did Captain Day ask to be enrolled in Delta's alcohol rehabilitation program prior to his discharge.

Day subsequently filed a grievance against Delta, which was denied. The Airline Pilots Association then requested arbitration, and the System Board of Adjustment was covened pursuant to the Airline Pilots' collective bargaining agreement with Delta.

In an opinion issued in January, 1987, the System Board determined that:

> [Day] ingested a considerable quantity of alcohol (beer, wine and Scotch Whiskey) in violation of the Company's (then) 24-hour rule and the FAA's 8-hour rule. He reported for Flight 437 on January 10, 1985, under the influence of alcohol and flew this Bangor-Boston trip as captain despite his impaired condition. A blood alcohol test administered to [Day] at 11:33 a.m. on January 10, 1985, indicated approximately 0.13 grams percent alcohol (well above the usual d.c.i. standard of 0.10) when grievant commenced flight 437 at about 7:05 a.m. that morning.

System Board Opinion, p. 27.

In a three-to-two opinion, a majority of the System Board found that, although Day had committed a dischargeable offense, he should have been offered the option of entering the Delta alcohol rehabilitation program instead of being terminated. The Board determined that Delta, by firing Captain Day, did not administer its alcohol rehabilitation program uniformly or fairly. This

conclusion was based on the fact that, on at least three prior occasions, crew members who attempted to report for duty while intoxicated were intercepted by fellow crew members or other Delta employees before take off. Rather than be discharged, they were either given the opportunity to enter Delta's alcohol rehabilitation program and/or given punishment less severe than discharge. Further, the Board's decision turned on its finding that although under Delta's Operations Manual crew members who allowed fellow crew members to operate air craft while under the influence of alcohol were "equally guilty," the first and second officers in this case were suspended and not discharged. The System Board's opinion reasoned:

> Nothing in the record indicates that the Company has advised its pilot group that a pilot who reports for work under the influence of alcohol but who is intercepted before he gets to the plane will probably not be discharged, but that if this pilot enters the plane his discharge will be automatic. The [Flight Operations Manual] says only that *reporting* for flight duty under the influence is cause for discharge.
>
> The Company, in other words, has not effectively implemented the policy it claims to have designed to encourage interception [of crew members under the influence] in the interest of flight safety.
>
> * * * *
>
> The troublesome element model in this case is that under the Company's scenario grievant should have been intercepted, and the fact that he was not intercepted was not grievant's fault but that of his fellow crewmembers. Moreover, as noted above, the Company, by having failed to communicate effectively its real interception policy, must share in the responsibility for the non-interception.

System Board Opinion at 32-33.

In its award, the Board concluded that the discharge of Captain William D. Day was "without just cause although [Day] did commit serious misconduct." Captain Day was awarded reinstatement, without back pay or related benefits, and Delta was ordered to pay for the costs of the alcohol rehabilitation program in which Day had privately enrolled several months after his termination with Delta. Further, Delta was directed to cooperate with Day and with the Federal Aviation Administration to allow Day to receive a first-class airman medical certificate.

The scope of judicial review over arbitration awards is extremely narrow. "Substantive review of an award is limited to a determination of whether an award is irrational, whether it fails to draw its essence from the collective bargaining agreement, or whether it exceeds the scope of the arbitrator's authority." *Butter Krust Bakeries v. Bakery, Confectionary and Tobacco Workers International Union*, 726 F.2d 698, 699 (11th Cir. 1984). In addition, a court may overturn an arbitration award where the award is contrary to a well-defined and definite public policy. *W. R. Grace v. Local Union 759, International Union of United Rubber, Cork, Linoleum and Plastic Workers*, 461 U.S. 757, 766 (1983). Delta argues that the arbitration award in this case must be set aside because the Systems Board exceeded its authority, and because the award violates a clearly defined public policy against allowing pilots to fly while intoxicated.

With respect to the first argument, Delta maintains that the Board acted outside its authority by fashioning a remedy which interfered with Delta's ability to carry out its statutory obligation to provide "the highest possible degree of safety in the public interest." 49 U.S.C. § 1421(b). Delta contends that federal law, including FAA regulations, place upon the company the exclusive authority to assess a pilot's abilities, giving full con-

sideration to "personal characteristics that could adversely affect safety." 14 C.F.R. § 121.413(4) *id.* The evidence produced at the hearing indicated that Day had at least two prior drinking episodes during which he suffered complete blackouts or loss of memory. The second of these incidents occurred less than a month prior to the blackout he suffered before piloting Delta flight 437.

Delta contends that Day's voluntary decision to begin drinking shortly before he was to act as pilot in command of a passenger flight evidences a deficiency in judgment and a willingness to endanger the lives of hundreds of passengers. It contends that an air carrier's decision as to such safety factors as pilot judgment may not be usurped by the Systems Board.

In support of its position, Delta cites *World Air Ways, Inc. v. International Brotherhood of Teamsters*, 578 F.2d 800 (9th Cir. 1978). In that case, the arbitration award reinstated a pilot whom the air carrier believed lacked the sound judgment necessary to operate an air craft. The pilot had been discharged after a series of incidents, including flying a plane with too little fuel, and missing approaches at at least three different airports. The arbitration board ordered his restatement, notwithstanding testimony indicating that increased training would enhance his technical capabilities but not ameliorate his poor judgment.

The Ninth Circuit Court of Appeals overturned the award, explaining that although there was a strong policy in favor of allowing disputes to be arbitrated, an equally strong federal policy gave carriers the responsibility for determining whether a given pilot has the capacity to operate an air craft safely. The Court found that, "It was the duty of the carrier to determine the competency of its pilots in the interest of public safety taking into account such things as 'personal characteris-

tics that could adversely affect safety.'" 578 F.2d at 803, quoting 14 C.F.R. § 121.413(4)(ii).

However, the scope of this decision was restricted in a later case when the Ninth Circuit held that the decision in *World Airways* did not exclude air passenger safety issues from arbitration. The Court explained that it was not the consideration of a safety-related issue that exceeded the appropriate scope of an arbitrator's authority; rather, the remedy in *World Airways* went beyond the arbitrator's authority because evidence in the record indicated that the pilot's judgmental errors were not correctable. *Association of Professional Flight Attendant v. American Air Lines*, 767 F.2d 1331, 1334 (9th Cir. 1985).

Under the collective bargaining agreement at issue here, the System Board's jurisdiction is extremely broad. The Board may consider "disputes between any pilot covered by this Agreement and the Company growing out of grievances or out of interpretation or application of any of the terms of this Agreement."[2] Nor does the agreement list specific reasons for discharge. Thus, the safety-related issue presented by Day's discharge was properly before the Board so long as the remedy did not violate the agreement or public policy. *See Northwest Air Lines v. Air Line Pilots Ass'n Int.*, 808 F.2d 76 (D.C. Cir. 1987), *pet. for cert. pending.*

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[2] Delta also argues that the Board acted outside its authority by evaluating Day's dismissal in light of Delta's alcohol rehabilitation program. Delta claims that because the program is not mentioned in the collective bargaining agreement, the Board may not consider it. However, this argument ignores the language of the agreement, which gives the Systems Board jurisdiction over disputes stemming from "grievances *or* out of an interpretation of application" of the collective bargaining agreement. [Emphasis supplied]. The term "grievances" is not limited by any language in the contract. Given this sweeping language, the arbitrators were authorized to consider Delta's alcohol rehabilitation program in connection with Day's discharge. *Cf. Loveless v. Eastern Air Lines*, 681 F.2d 1212 (11th Cir. 1982).

This court reads *World Airways* to stand for the proposition that an arbitration award cannot put an air carrier in the position of violating its duty to ensure air safety. *Flight Attendants* makes clear that the earlier case did not really involve an arbitration award going beyond the arbitrator's authority. Rather, the true rationale underlying *World Airways* was that it is contrary to public policy to allow a pilot to fly when his judgment is irreparably impaired.

Thus *World Airways* can be seen to support Delta's second argument, that being that the arbitrator's award violates public policy. In order for an arbitrator's award to be overturned as a violation of public policy, the policy must be "well-defined and dominant." *W. R. Grace*, 461 U.S. at 766. The public policy at issue may be ascertained by "reference to the laws and legal precedents and not from general considerations of supposed public interests." *Id.*, quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945).

It seems that two different interpretations of the public policy doctrine have developed among the circuits. The Eleventh Circuit has not yet delineated the scope of the doctrine, other than to acknowledge its existence. *See e.g., Shopmen's Local 539 v. Nosher Steel Co.*, 796 F.2d 1361 (11th Cir. 1986), and *Drummond Coal v. United Mine Workers of America, District 20*, 748 F.2d 1495 (11th Cir. 1984). The First, Fifth and Seventh Circuits have held that where the worker's conduct constituted a blatant violation of a clearly defined public policy that reinstatement is inappropriate. The D. C. Circuit has recently promulgated a much narrower view of the public policy doctrine, holding that the act of reinstating a discharged worker must somehow violate a specific policy.

An examination of the relevant case law makes this distinction clear. In *United States Postal Service v. American Postal Workers Union*, 736 F.2d 822 (1st Cir.

1984) a postal worker embezzled funds from the post office during his employment. The arbitration board, finding that certain mitigating circumstances existed, ordered that he be reinstated without back pay. The post office sued to overturn the award on grounds that reinstatement would violate public policy. The union argued that because there was not a specific public policy against the reinstatement of embezzlers, that the award did not violate public policy.

The First Circuit held that the public policy doctrine was not as narrow as the union claimed. Although in at least one prior case reinstatement itself violated a federal law,[3] the Court did not require such a close nexus between the award and a specific public policy in all cases. Rather, the court determined that reinstatement of a worker who had embezzled funds from the post office would serve to encourage embezzling and undermined the government's ability to enforce the public policy against embezzling. The Court explained:

> Aside from any considerations bearing directly on Cote [the dismissed employee] we cannot avoid the common sense implications that requiring the rehiring of Cote would have on other postal employees and on the public in general. Other postal employees may feel there is less reason for them to be honest than they believed-the Union could always fix it if they were caught. Moreover, the public trust in the Postal Service, and in the entire federal government, could be diminished by the idea that graft is condoned.

736 F.2d at 825.

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[3] In *American Postal Workers v. United Postal Service*, 682 F.2d 1280 (9th Cir. 1982), a postal worker engaged in an unauthorized strike. The arbitration board ordered the worker reinstated. His reinstatement explicitly violated 5 U.S.C. § 7311, which stated that individuals who participated in strikes against the United States government may not hold a position with the government. On this basis, the Ninth Circuit declined to enforce the arbitrator's award.

Similarly, in *S. D. Warren Company v. United Paper Workers International Union*, 815 F.2d 178 (1st Cir. 1987), the Court declined to enforce an arbitration award which required the reinstatement of two employees who had been fired for using or possessing illegal drugs on company property. The Court once again noted that in order to invoke the public policy exception the court need not point to some positive rule of law declaring that reinstatement of an employee fired for possession of drugs is illegal. Rather, the Court found that the reinstatement of employees who had clearly violated not only company policy but public law by possessing illegal narcotics was sufficiently in violation of public policy to warrant overturning the arbitrator's decision. The Court was particularly concerned with the issue of work place safety, because the employees worked around heavy machinery, and doing so under the influence of drugs could jeopardize the safety of their co-workers.[4]

The Fifth Circuit has applied the public policy doctrine in the same manner. In *Amalgamated Meat Cutters v. Great Western Food Company*, 712 F.2d 122 (5th Cir. 1983), the Court considered the case of a discharged employee who had wrecked the company's tractor-trailer rig while under the influence of alcohol. The arbitrator ordered the employee reinstated on grounds that Great Western failed to investigate the accident thoroughly, although the employee did admit to drinking shortly before the accident. The Court noted that drinking within four hours of operating a motor vehicle or operating a motor

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[4] The Court also held that the decision was outside the scope of the arbitrator's authority because the unambiguous wording of the collective bargaining agreement said that where drugs are implicated an employee may be fired. Thus, once the arbitrators determined that the employees had actually used or possessed drugs on company property, they did not have the authority to consider mitigating circumstances in deciding whether the employees should have been discharged. Here, the arbitrators' authority was not so constrained.

vehicle under the influence of alcohol violated federal motor carrier safety regulations. The Court determined:

> Thus, the public policy of preventing people from drinking and driving is embodied in the case law, the applicable regulations, statutory law, and pure common sense. The policy is "well defined and definite." *W. R. Grace and Company*, —— U.S. at ——, 103 S.Ct. at 2182. To enforce the arbitrator's award in this case, an award which compels the reinstatement to driving duties of a truck driver who admittedly drank while on duty, would violate this public policy. Therefore, the district court erred in enforcing the award.

712 F.2d at 125.

The Fifth Circuit again considered the public policy doctrine in *Misco, Inc. v. United Paper Workers International Union*, 768 F.2d 739 (5th Cir. 1985), *cert. granted*, 55 U.S.L.W. 3472 (1987) (No. 86-651). In that case, the arbitrator ordered reinstatement of an employee found to be in violation of the company's prohibition against possession of drugs on company property because the arbitrator did not consider the presence of marijuana in the employee's car to be a significant violation. The Fifth Circuit disallowed enforcement of the arbitration award, noting that use or possession of drugs, especially in the work place, was contrary to the public policy and that enforcement of the award could encourage other workers to engage in illegal and potentially dangerous conduct.

The Seventh Circuit has also construed the public policy exception in a manner consistent with the First and Fifth Circuits' approach. In *E.I. DuPont de Nemours v. Grasselli Employment Association*, 790 F.2d 611 (7th Cir. 1986), the Seventh Circuit noted that in reviewing an award a reviewing court must respect the arbitrator's finding of facts but that the judgment of whether the

award violates public policy is a *de novo* one for the court. The Court explained that the arbitration award need not, by itself, violate a positive rule of law. Rather, the enforcement of the award must have the effect of violating a clearly defined public policy. *See also International Union of United Auto Workers v. Keystone Consolidated Industries*, 782 F.2d 1400 (7th Cir. 1985) (arbitrator's award vacated where enforcement would violate clearly defined public policy behind the enactment of ERISA).

The D. C. Circuit stands alone in giving a limited interpretation to the public policy exception. In *Northwest Air Lines*, 808 F.2d at 76, the first officer was terminated for flying an aircraft while intoxicated. The system board determined that in light of the employee's alcoholism, subsequent rehabilitation, and other mitigating factors, the discharge should be reduced to a suspension without back pay with reinstatement dependent upon his unconditional recertification by the FAA. The district court overturned the award on grounds that it violated public policy. The Court of Appeals for the District of Columbia reversed, holding that in order for an award to contravene public policy the act of restatement must itself violate some positive rule of law. The Court found that there was no FAA regulation or other rule forbidding the reinstatement of alcoholic pilots who have undergone rehabilitation. Thus, the court found that public policy exception inapplicable.

The contrast between the two approaches is clearly illustrated by the D.C. Circuit's treatment of a postal worker dismissed for embezzling. In *American Postal Workers v. United States Postal Service*, 789 F.2d 1 (D.C. Cir. 1986), the arbitrator reinstated an employee who had admitted to dishonesty in postal service transactions because he found that the postal worker should have been given Miranda warnings before being questioned about his illegal embezzlement of post office funds.

The postal service sought to overturn the award as violative of public policy, as the First Circuit did when it dealt with a similar fact situation.[5] The D.C. Circuit found that "the arbitrator's award was not itself unlawful, for there is no legal prescription against the restatement of a person such as the grievant. And the award did not otherwise have the effect of mandating any illegal conduct." 789 F.2d at 8. Thus the court found public policy exception inapplicable.

Although the Eleventh Circuit has not had the occasion to analyze the public policy exception in detail, the former Fifth Circuit did apply it in at least one case, that being *National Labor Relations Board v. Dixie Motor Coach Corp.*, 128 F.2d 201, 203 (5th Cir. 1942). In that case, the former Fifth Circuit denied enforcement of an NLRB award order reinstating a bus driver who had been discharged for drinking while on duty.[6] In light of this former Fifth Circuit decision, this court finds that the correct approach is the majority position outlined above, and declines Defendant's invitation to follow the D. C. Circuit in its narrow construction of the public policy doctrine.[7]

After carefully examining the facts of this case as well as the above legal precedents, the court finds that enforcement of this award would violate clearly established public policy against allowing the pilots of airliners to operate aircraft under the influence of alcohol. That policy is "well defined and dominant" and codified in FAA regulations. The public safety implications of a

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[5] *See United States Postal Service v. American Postal Workers Union*, 736 F.2d 822 (1st Cir. 1984), discussed above.

[6] Under *Bonner v. The City of Prichard, Ala.*, 661 F.2d 1206 (11th Cir. 1982), former Fifth Circuit precedent is binding upon this court.

[7] Even in the absence of binding precedent, the court would follow the majority approach as the better-reasoned position.

situation such as the one that occurred when Captain Day piloted Delta Flight 437 are enormous. While in some sense it may be "unfair" that Captain Day was fired while other pilots who were intercepted before flying were allowed to try to rehabilitate before being discharged, Delta is perfectly correct in arguing that failure to discharge in this case could render ineffective the only real deterrent that an airline carrier can use to try and prevent its employees from operating aircraft under the influence of alcohol.

In fact, Delta indicated that this is the only time in Delta's history, to its knowledge, that an aircraft was actually flown by an intoxicated pilot. While in some sense it may not be Captain Day's "fault" that he flew the airplane while drunk, he did so, and allowing his reinstatement would give other aircraft pilots the message that, when they get into that kind of trouble, "the union could always fix it." *Postal Services*, 736 F.2d at 825. The court cannot imagine a more egregious violation of the public policy against allowing pilots to fly while intoxicated.[8]

The court is not suggesting that an airline pilot may not be reinstated under different circumstances, or that a discharged pilot cannot be rehabilitated and hired by another airline. However, the arbitrators in this case were not authorized to decide whether, having been rehabilitated, Captain Day should be rehired. *See Butter Krust Bakeries*, 726 F.2d at 698 (remedial events occurring after termination are not to be taken into account as mitigating a dischargeable offense). Rather, the arbitrators' decision was limited to whether or not Delta

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[8] The negative impact of the System Board's decision is exacerbated by the fact that the arbitrators' award may be interpreted to mean that every Delta pilot must be given the opportunity to go into alcohol rehabilitation before being discharged, thus giving each pilot the opportunity to fly an airplane drunk *at least once* before being discharged.

was justified in discharging Day *at the time*, after he had flown an airplane while drunk, and before he had given the airline any indication that he was an alcoholic. The fact that Captain Day sought treatment for alcoholism after his discharge, and subsequently controlled his drinking, is quite simply irrelevant to the public policy implications of this case.[9]

Finally, Delta argues that requiring Delta to pay the costs of the private alcohol rehabilitation treatment which Captain Day sought after his discharge amounts to punitive damages, and is beyond the scope of the arbitrator's authority. The court agrees with Defendant that these damages are compensatory, not punitive, and therefore permissible. However, the court cannot find any allowable reason to overturn the arbitrators' award. As noted previously, the Board has jurisdiction over all grievances arising between Delta pilots and the company. See note 2, *supra*. This includes any grievance Day may have with respect to his entitlement to enroll in Delta's alcohol rehabilitation program. While it is true that Day did not assert a right to such treatment until well after his discharge, Day made the claim the subject of his grievance and the question was therefore properly before the Systems Board.

No matter how strongly this court may disagree with the factual findings[10] or conclusions of the Board, it does not have jurisdiction to overturn the arbitrators' decision unless the award fails to pass scrutiny on one of

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[9] In fact, Defendant has informed the court that Captain Day, having successfully undergone treatment, is currently working for another airline.

[10] It seems inconceivable that Day should be entitled to participate in Delta's alcohol rehabilitation program when he did not make such a request until after his discharge, but such were the findings of the Systems Board, and this court has no authority to second-guess them.

the four grounds enumerated above. Requiring Delta to reimburse Day for the costs of his private therapy does not exceed the arbitrators' authority, given their factual conclusions regarding his entitlement to treatment in Delta's program. Given the sweeping scope of the Board's jurisdiction under the Agreement, the court cannot say that the award fails to draw its essence from the Agreement. It is not irrational, and no corruption has been alleged.

With respect to the public policy considerations, the court finds that requiring Delta to cooperate with Day and the FAA in recertifying Day is violative of public policy, for the same reasons his reinstatement is unsupportable. However, the court cannot say that, as a matter of law, allowing Day to be treated for alcoholism violates public policy. Thus this portion of the award must be upheld.

In sum, Plaintiff's motion for summary judgment is GRANTED in part and DENIED in part. Defendant's cross motion for summary judgment is GRANTED in part and DENIED in part. The court vacates the Systems Board's award insofar as it required reinstatement of Captain Day, or that Delta cooperate in getting Day recertified. Delta is ordered to pay the money damages awarded to Day by the Board. The clerk is directed to enter final judgment based upon this order. Plaintiff's request for oral argument is DENIED.

SO ORDERED, this 30th day of September, 1987.

/s/ Orinda D. Evans
ORINDA D. EVANS
United States District Judge

DELTA AIR LINES PILOTS' SYSTEM
BOARD OF ADJUSTMENT

ALPA Case #1-85
William D. Day

OPINION OF NEUTRAL CHAIRMAN
AWARD OF SYSTEM BOARD

System Board

Richard Colby and James Suckow
(appointed by Association)

John Moran and C. A. Smith
(appointed by Company)

Mark L. Kahn, Neutral Chairman

Hearings held January 28, 29, 30 and 31, 1986
Atlanta, Georgia

For the Company

Appearances:

Thomas J. Kassin, Esq.
Gregory L. Riggs, Esq.

Witnesses:

Robin Surette, F/A, BOS
Maureen Dion, F/A, BOS
Linda Rehal, F/A, BOS
Helen Frazier, Customer
Service Supervisor, BOS
James Baker, Chief Pilot, BOS
James W. Panter, Supervisor
Implied Consent Section
Georgia Bureau of Invest.

Peter V. Voorhees, 727 F/O, BOS
David Rothbart, 727 S/O, BOS
Harry C. Alger, Asst. V.P. Opns.
Lynn Hankes, M.D., Dir., Addiction Treatment Program
South Miami Hospital, FL
Nestor Kowalski, M.D., Avn. Prev. Medicine Assoc., Denver, CO

For the Association

Appearances:

William A. Roberts, Esq.
Robert A. Drew, Contr. Adm.

Witnesses:

William D. Day
Grievant
Joseph Westermeyer, M.D.
Dir., Program for Alcohol Drug Dependence, Univ. of Minn. Hospitals & Clinics

OPINION

This proceeding before the Delta Air Lines Pilots' System Board of Adjustment, ALPA Case #1-85, involves the grievance of William D. Day, a B-727 Captain based at Boston. Captain Day was discharged on the basis of the following "Notice of Termination" dated January 15, 1985, from Captain James M. Baker, Chief Pilot at Boston (BOS):

> This letter is being presented to you in accordance with Section 18.C.1 of the current Agreement between Delta Air Lines Inc. and the Air Line Pilots in the service of Delta Air Lines Inc. as represented by the Air Line Pilots Association International.
>
> On January 9, 1985, you flew as Captain on Flight 410 from Boston to Bangor, Maine, and arrived in

Bangor at approximately 2 P.M. You had a scheduled layover at the Holiday Inn in Bangor and were scheduled to fly Flight 437 from Bangor to Boston, departing at 7:05 A.M. on January 10, 1985.

While on your layover in Bangor, you consumed alcoholic beverages within twenty four hours of the scheduled departure of your assigned flight in direct violation of Company rules. You continued to consume alcoholic beverages within eight hours of the scheduled departure of your flight in direct violation of Federal Aviation Administration Regulations.

On January 10, 1985, you reported for duty on Flight 437 under the influence of alcohol. You served as Captain on that flight and operated the aircraft from Bangor to Boston, during which time you were under the influence of alcohol.

Your actions in consuming alcoholic beverages in violation of Company and FAA Rules and Regulations, and in reporting for and operating an assigned flight while under the influence of alcohol demonstrate a blatant disregard for your professional responsibilities and for the safety and welfare of your passengers, fellow crewmembers and the public. Accordingly, your employment is hereby terminated effective this date.

Captain Day's grievance letter was submitted the following day to Captain C. A. Smith, Vice President/ Flight Operations. The requested hearing was conducted on January 24, 1985, by Glen Sage, System Manager — Line Operations. Captain Sage denied the grievance on January 28, 1985, and the Association, on January 31, 1985, submitted the dispute to the System Board.

A four-member System Board deadlocked after hearing this case on or about June 25, 1985. A five-member System Board, including the undersigned as fifth member

and Neutral Chairman, conducted hearings on January 28, 29, 30 and 31, 1986. Both parties agreed, at the outset (Tr. 6-7), that this case was properly in arbitration before the System Board. Each party had a full opportunity, during these hearings, to present evidence and argument on behalf of its position, and a transcript of the hearings was prepared by certified court reporters.

Closing oral argument was waived in favor of post-hearing briefs and reply briefs. Receipt of each party's brief dated July 18, 1986, and of each party's reply brief dated August 22, 1986, completed the record. On October 21, 1986, the System Board reviewed the record and considered the merits of the case during an executive session in Atlanta, Georgia. A draft of this decision was subsequently prepared by the Neutral Chairman and submitted to the other Board members for review and comment. Sole responsibility for the content of this Opinion remains, of course, with the Neutral Chairman.

Background

Grievant has a Delta pilot seniority date (including prior Northeast Airlines service) of January 17, 1966, and had never been disciplined by the Company prior to his discharge on January 15, 1985. On January 9, 1985, grievant was the Captain on Flight 410 from Boston, where he was based, to Bangor, Maine, arriving at about 2:00 P.M. The other cockpit crew members were First Officer David Rothbart and Second Officer Peter V. Voorhees. Four Flight Attendants comprised the cabin crew: Robin Surette (the A-Line F/A, in charge), Maureen Dion, Linda Rehal and Debbie Kleibech. The crew had a scheduled layover at the Bangor Holiday Inn, and was to operate Flight 437 to Boston with a scheduled departure of 7:05 A.M. the following day.

Grievant testified that he had been sick with the flu, and in bed with a high fever for four days, during the

week before his current trip began on January 7; that he was still feeling tired when, against his wife's wishes, he took the trip; that he was taking Sudafed (a decongestant), vitamins and aspirin; and that he was still feeling tired on January 9 and 10 from the after-effects of the flu. (Tr. 714-16)

Grievant testified that when he arrived at the Bangor Holiday Inn at about 2:30 P.M. on January 9, he took some Sudafed and aspirin and rested until about 4:15 P.M.; that he went to the lobby at about 5:00 P.M. to join the crew for dinner, but found no one there; that F/O Rothbart was in the lounge having a beer and waved grievant over; that grievant had a beer and some cheese, and then a second beer, while they waited for the others; and that when others arrived there was another round during which grievant drank a third beer before six of them went to dinner in a car driven by S/O Voorhees: the three pilots, Angela Miller (a friend of S/O Voorhees) and two of the four Flight Attendants. During their dinner at the Pilot House restaurant, according to grievant, the group of six shared three carafes of wine.

Grievant testified that upon arriving back at the Holiday Inn at about 8:45 P.M., the entire group went into the lounge for a "nightcap"; that F/O Rothbart and S/O Voorhees left: that grievant and Angela Miller, who hadn't finished their drinks, were talking and were joined by a man from the next table who wanted to get information about the Bangor area; that Miller moved over to where the band was playing, and the man offered to buy grievant a drink; that grievant accepted the offer; that he and the man continued to talk; "and that's basically about the last I remember of the evening." (Tr. 717-21, 785-87)

Grievant now maintains that he blacked out shortly before 10:00 P.M. on January 9, but he acknowledges

that he must have switched to scotch and — based on bar bills examined at the four-member Board hearing — that he continued to drink scotch until about 12:30 A.M. (Tr. 769, 834-35). Grievant testified (Tr. 787) that his next recollection was "When my alarm went off at 5:15 in the morning."; that "I was cold, it was cold in my room and I . . . had a sore throat, swollen glands, and sinus congestion, tired."; but that he had no awareness of how late he had been up drinking the previous night (Tr. 788, 722).

Grievant fell back asleep after his 5:15 A.M. alarm and remained asleep until awakened at 6:10 or 6:15 A.M. when F/O Rothbart knocked on the door to grievant's room. Grievant told Rothbart that the others should proceed to the airport and that he would get there soon.[1] Rothbart, at about 6:40 A.M., called grievant from Operations and said that the van would be waiting for him at the Holiday Inn's front door. Grievant told Rothbart that he was "going out the door." (Tr. 723)

Rothbart met grievant at the ticket counter door, told grievant that his flight kit (which had remained at Operations overnight) was already on board, and the two walked through the baggage bin area and out of that door across the ramp to the jetway stairs, a distance (according to grievant) of about 200 feet (Tr. 833). Grievant testified (Tr. 723-25) that there was patchy ice, wind blowing at 30 or 35 knots, and some dry snow blowing across the ramp:

> I went first up the stairs, I opened the door, Dave [Rothbart] grabbed the door behind me, I walked in because there was only room for one person to

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[1] The testimony of Flight Attendants Surette, Dion and Rehal (Tr. 60, 92, 99-100, respectively) establishes that F/O Rothbart, upon returning to the Holiday Inn lobby from grievant's motel room, told the rest of the crew: "We're going without him. He's still out cold."

> go through the door at a time. He came in behind me. I had my bag in my hand; he grabbed me by the arm, he said, "I'll take your bag, you just get undressed and get in your seat."

Grievant maintains that he did not feel drunk that morning but simply didn't feel well, just as he had not felt well the entire trip (Tr. 722-23). Grievant asserts that he must have experienced a blackout starting just before 10:00 P.M. on January 9, 1985, because he had no recollection of drinking to excess and violating the eight-hour no-alcohol rule of the FAA.[2]

The testimony of all three cockpit crew members is that grievant flew the trip from Bangor to Boston without incident. According to grievant (Tr. 729):

> . . . When we got out to the end of the runway 33 in Bangor, Dave Rothbart asked me, he says, "Would you like me to fly because — until you get caught up?" He thought that since I was rushed and everything, which often happens when you're rushed you feel uncomfortable. I told him no, I felt fine.

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[2] According to grievant, this was his third blackout. He testified that the first blackout had occurred at a party in 1977, when he began drinking on an empty stomach at about 6:00 P.M., drank for about two hours, and then awakened in his own bed the following afternoon with no recollection of the intervening period. Grievant stated that this experience so frightened him that he did not drink at all for two or three years and then limited himself to beer and wine when he resumed drinking in 1980. His second blackout, according to grievant, took place around Christmas of 1984 upon his return from a four-day trip at a party in his home. Grievant recalls drinking about three Scotches and being very tired, after which he remembers nothing until awakening the following afternoon. Grievant testified that he then decided to stop drinking Scotch, which seemed to be associated with his blackouts, and to stick to beer and wine; that he initially drank only beer and wine on January 9, 1985, in Bangor; and that "when I started drinking Scotch that night, I know now that that's when I lost control." (Tr. 769)

Grievant had entered the aircraft shortly before departure time and just as the last passenger was also boarding. Flight Attendant Surette testified (Tr. 62):

> Dave [Rothbart] was supporting the Captain. He had his arm behind the Captain's arm and appeared to be holding on to the back of his arm, like around the elbow portion. And the Captain seemed to be leaning against Dave.

F/A Surette also testified (Tr. 81) that she smelled liquor as grievant and Rothbart walked by, and that (Tr. 61):

> His [grievant's] face was very red, his eyes were glassed over, and he just looked very disoriented, not right.

Surette added that "Maureen [F/A Dion] and I exchanged a look of utter fear." F/A Dion (Tr. 94-95) and F/A Rehal (Tr. 100-103) corroborated the substance of F/A Surette's testimony. F/A Rehal testified that after observing grievant's difficulties in getting into his cockpit seat she said to F/A Dion: "He's drunk."

The cockpit door was immediately closed and locked, after which the cabin door was closed and the jetway pulled away. F/A Surette knocked on the cockpit door. When the door was opened by S/O Voorhees, who stood right in the doorway and opened the door only enough to talk to Surette, she asked him if everything was all right and he replied, "Everything is fine." According to F/A Surette (Tr. 64-65):

> And then, from his viewpoint, he could see . . . Linda Rehal leaning against the galley. And he said to me, "The blonde doesn't look convinced." And I said, "She's not and neither am I." And he said, everything is fine. You take care of things out there." And I said, "No, you take care of things up

there." And then we were pushing back, the door shut, and I had to do my PA.

After reaching cruise altitude, S/O Voorhees walked back to the First Class galley and obtained coffee for himself and the other pilots. There, he had a substantial conversation with F/A Surette during which she told Voorhees that the Flight Attendants believed that grievant was intoxicated (Tr. 253-55, 66-67) and he again assured her that everything was all right.

S/O Voorhees, upon returning to the cockpit, promptly wrote a note that he passed up to F/O Rothbart: "We got trouble with the F/A's". Rothbart, upon reading the note, instructed Voorhees to disconnect the cockpit voice recorder by pulling the appropriate circuit breaker (Tr. 267). Voorhees did so.[3] The three cockpit crew members then engaged in what may fairly be called some off-the-record discussion of the Flight Attendant "trouble" until, four or five minutes later, the cockpit voice recorder was turned back on at Rothbart's direction (Tr. 353).

The Flight Attendants, discussing the situation among themselves, decided that it would have to be reported at Boston to Chief Pilot James Baker. This was done by F/A Rehal. Meanwhile, the passenger who had been last to board at Bangor, and who also believed that the Captain was intoxicated, reported this at Boston to a Delta Customer Service Manager and she, in turn, gave this information to Captain Baker.

Captain Baker called the pilot crew into this office and promptly concluded that grievant's appearance and behavior fully justified the concerns of the Flight Attendants. All three were removed from flight duty and ordered by Baker to take blood alcohol tests, which were

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[3] It is concededly a violation of the Federal Aviation Regulations to disconnect the cockpit voice recorder during a flight.

administered at the Logan Airport Medical Station. No alcohol was detected in the blood of either F/O Rothbart or S/O Voorhees. The outcome of grievant's blood test is set forth in the following joint stipulation of the parties (Tr. 5-6, Co. Ex. 3):

> 1. The grievant . . . was given a blood alcohol test on January 10, 1985 at 11:33 a.m. by the Logan Airport Medical Station of Massachusetts General Hospital.
>
> 2. The results of the blood alcohol test given to the grievant on January 10, 1985 at 11:33 a.m. established that the grievant had a blood alcohol level of 65mg percent (.065 grams). . . .

Grievant, as noted above (p. 1) was discharged on January 15, 1985. On that same date, F/O Rothbart was issued a one-year suspension without pay and benefits, and S/O Voorhees was issued a six-month suspension without pay and benefits. Their discipline notices each contained the following statement regarding the basis for their respective disciplinary penalties:

> On January 10, 1985, you served . . . on Flight 437 from Bangor to Boston . . . Prior to the commencement of this flight, you became aware of the obvious fact that the Captain appeared to be intoxicated, yet you and Mr. Voorhees [or Mr. Rothbart] willingly participated in the conduct of the flight as crewmembers. Your actions jeopardized the safety of Flight 437, the safety of the passengers, as well as the safety of the other crewmembers on said flight.
>
> Your knowing participation in the operation of the flight while in violation of the Company's twenty four hour rule and while you were aware that Captain Day appeared to be intoxicated compromised the safety of the flight. You intentionally disregarded

your professional responsibilities and in doing so endangered your passengers, fellow crewmembers and the public. Such irresponsible conduct will not be tolerated.

Subsequently, however, the Company reduced F/O Rothbart's one-year penalty to four months and S/O Voorhees' six-month penalty to three months (Tr. 386).

The Company's policy relating to alcohol use, as of January 1985, was set forth in its *Flight Operations Procedures Manual* [FOPM], Section 3, page 11 (10-12-84):

> USE OF ALCOHOL OR OTHER DRUGS
>
> Use of intoxicating beverages, including wines and beer, by flight crew members while in uniform or within 24 hours prior to departure of a flight is prohibited.
>
> The excessive use of intoxicants or drugs by any flight crew member, regardless of the above limitations, constitutes cause for discharge.
>
> Any evidence of the use of alcohol or other drugs which is apparent at the time of reporting for flight duty, also constitutes reason for discharge.
>
> Any flight crew member who knowingly permits another flight crew member to attempt to perform his flight duty while under the influence of intoxicants or drugs shall be considered equally guilty. [Orig. emphasis.]

The Federal Aviation Regulations (FARs) provide:

> § 91.11 Liquor and Drugs
>
> (a) No person may act as a crewmember of a civil aircraft —
>
> (1) within 8 hours after the consumption of any alcoholic beverage;

(2) while under the influence of alcohol;

(3) while using any drug that affects the person's faculties in any way contrary to safety.

The Company, in 1977, instituted an Alcohol Rehabilitation Program. The 1980 statement of Standard Practice for this Program includes this introductory material (ALPA Ex. 3):

1026.1 GENERAL

Excessive use of alcohol normally results in job related problems such as absenteeism and deteriorating performance, as well as personal problems including ill health, financial difficulties and degeneration of relationships with family and friends. Today, the problem of alcohol dependency has been resolved for many by their dedicated resolve to help themselves through participation in alcohol rehabilitation programs at various centers throughout the country. Delta's Alcohol Rehabilitation Program is designed to assist personnel who suffer from alcohol dependency if they individually recognize or admit that they have a problem and are willing to face up to the situation by obtaining treatment.

It is hoped that through this program, individuals who suspect they may be developing a dependency on alcohol will be encouraged to seek help before their dependency results in a serious deterioration of their health or on-the-job performance. Individuals who participate in the program will be assured of confidentiality. A request for treatment of alcohol dependency will not jeopardize an individual's job security. . . .

This program should not be construed in any manner as condoning intemperance or lowering company

> standards applicable to on-the-job conduct and job performance. Participation in the program will not absolve individuals from their responsibilities to Delta, their fellow employees, or appropriate authorities, or in any manner infringe upon the company's rights and responsibilities to administer discipline in connection wth any associated acts of misconduct.

The Program provides (§ 1026.10) that where the employee has developed work-related problems, he or she is to be "offered the choice of admitting the problem and entering the Alcohol Rehabilitation Program, or being terminated for unacceptable work performance." It is also specified that an employee may participate in the Program only once, and that failure to complete the Program successfully will result in termination (§ 1026.8-B).

Position of the Company

The Company emphasizes that it is charged by law to provide "the highest possible degree of safety in the public interest." 49 U.S.C. § 1421 (b). Accordingly, in the Company's view, "An airline's determination regarding a pilot's fitness and competency is not to be set aside unless it can be shown that the airline acted arbitrarily or in bad faith." (Br. 37)

The Company points out that, to ensure against pilot impairment, it prohibits aircraft operation by a pilot under the influence of *any* alcohol. (Br. 41) It cites the applicable provisions in its FOPM (see above, p. 10), noting that later in 1985 its 24-hour rule was amended so as to prohibit alcohol consumption within eight hours of a flight, "consistent with the Federal Aviation Regulations." (Br. 42) The Company describes its alcohol policy this way (Br. 15-16):

> . . . To keep alcohol out of the cockpit, Delta has developed a comprehensive set of incentives and de-

terrents to encourage pilots with alcohol problems to come forward and seek assistance prior to an incident of alcohol related job misconduct (T. 368). Among those incentives is a program whereby pilots with alcohol problems who are identified prior to an incident of alcohol related job misconduct are eligible for participation in Delta's alcohol rehabilitation program. The costs of treatment, sick leave and other benefits are paid for by Delta (T. 369-371). As a deterrent, however, pilots identified as having an alcohol problem as a result of an alcohol related incident of job misconduct, face disciplinary action up to and including termination (T. 369, 414-415).

Delta's safety net of policies and practices is designed to maximize the opportunity for detection of impaired pilots prior to the point at which the safety of the traveling public is directly threatened. To encourage co-worker participation in accomplishing this objective, Delta has determined that the period of detection of an impaired pilot without fear of automatic discharge should run to the point that a pilot reports to the aircraft (T. 974-975). If an impaired pilot is detected by a co-worker after reporting to work but prior to reporting to the aircraft, it is Delta's policy to evaluate all of the circumstances (Tr. 976). In exceptional circumstances, a pilot may be admitted into the Company's alcohol rehabilitation program without disciplinary sanctions. Once a pilot reports to the aircraft, Delta's overriding concern for the safety and welfare of its passengers compels the termination of that pilot (T. 976).

Delta management had found this extended period for detection to be an effective incentive for co-workers to intervene in a positive manner in the interest of safety without fear of reprisal for reporting a co-worker. Delta firmly believes that this

> period is essential to break the conspiracy of silence among pilots to ensure that its safety net works so that no flight operates with a pilot under the influence of alcohol (T.977). . . .

The Company observes, in regard to this case (Br. 43):

> Delta's no-alcohol policy is well-known to all of its pilots. The grievant admitted that he was aware of Delta's rules relating to alcohol (T. 820). Despite his knowledge of the rules and his professional obligations, he started an evening of heavy drinking that progressed from beer and wine to scotch. With a blood alcohol level of .13 grams percent alcohol,[4] which caused him to have difficulty in walking (i.e., requiring First Officer Rothbart to hold him up and bumping the center console as he entered the cockpit) and talking (i.e., he had to intentionally slow down his speech in an effort to minimize slurring), the grievant proceeded to pilot and command the Delta passenger jet from Bangor to Boston.

The Company observes (Br. 45):

> Delta has a well established policy of strictly enforcing its no-alcohol rule. It has consistently drawn the line at reporting to the aircraft, and has terminated the employment of all pilots who crossed that line. The grievant not only reported to the aircraft, *but he operated the aircraft as pilot in command*, directly jeopardizing the safety of the passengers and other crew members. [Orig. emphasis.]

The Company summarizes as follows the characteristics of four previous instances in which a Company pilot

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[4] The estimate of 0.13 grams percent alcohol is derived from grievant's blood alcohol test result at 11:33 A.M. on January 10, 1985 (0.065), projected backward to 7:00 A.M. that same day on the premise of an average alcohol assimilation rate of 0.015 grams percent alcohol per hour. See testimony of James W. Panter, Georgia Bureau of Investigation (Tr. 224).

reported for work under the influence of alcohol: *Tarr, Rochford, O'Shea* and *Cantrell* (Br. 45-48):

> . . . Tarr and Rochford were pilots who reported for duty under the influence of alcohol but were detected prior to ever reaching the aircraft. Tarr was intercepted by two other pilots who reported him to the Chief Pilot. Following an intervention and alcohol rehabilitation, Tarr was reinstated without discipline because the safety net worked and the pilot was intercepted by other pilots well before the flight was to operate (T. 424-425). Rotchford was given the opportunity to retire in lieu of facing disciplinary action. He was never permitted to pilot another Delta aircraft following that incident (T. 424).
>
> O'Shea and Cantrell were pilots who actually reported to the aircraft while under the influence of alcohol. Both pilots were intercepted *prior to operating the flight.* O'Shea was stopped by the other pilots, who properly cancelled the flight. Cantrell was reported by the flight attendants on board the aircraft prior to the flight departing. Both pilots were terminated by Delta.
>
> O'Shea was ultimately brought back to work by Delta voluntarily after one year without a System Board case. Delta acted due to a premature promise made by Captain Alger to Captain O'Shea at the time that he initially investigated the O'Shea incident and prior to all of the facts involving O'Shea's drinking coming to light. As explained by Captain Alger, "we felt because of Corporate ethics and morality, that we had an obligation to uphold our original promise and commitment to Captain O'Shea in his return to work. That does not in any way mitigate the fact that termination was the appropriate discipline." (T. 394)

> Mr. Cantrell was returned to work following a System Board arbitration decision. In that case, *Delta Air Lines*, Case No. 11-8 (Scearce, 1985), the grievant was reinstated, although the System Board found that the Company "had cause for removal of the grievant." *Supra* at 15. The facts of the case are quite distinct from the case involving the grievant.
>
> Mr. Cantrell was a First Officer on the Boeing 767 aircraft. He reported to a flight in Atlanta, having consumed two drinks while commuting as a passenger on a flight from Dallas. Mr. Cantrell was suspected of drinking by the flight attendants while the aircraft was on the ground *prior* to passenger boarding. When questioned by the Chief Pilot in Atlanta, he readily admitted his drinking and was removed from the flight prior to its ever operating. . . .
>
> . . . Although perhaps well intentioned and moved by the extremely emotional testimony of the grievant as to his recovery and extraordinary efforts to help others, the System Board's exception to Delta's no-alcohol policy has weakened Delta's efforts to keep alcohol out of the cockpit. [Underlining as in original.]

The Company emphasizes that "in no other Delta disciplinary case did a pilot fly an aircraft while intoxicated" and that "It is absolutely critical to Delta's safety net that no further exceptions to its no-alcohol policy be made." (Br. 48) ALPA has failed, in the Company's view, to show that the Company unfairly discriminated against grievant: "ALPA's claim of disparate treatment is without merit and should be dismissed." (Rep. Br. 9-10)

The Company submits that grievant's undiagnosed alcoholism does not excuse his operation of a passenger jet

while under the influence of alcohol. "It is clear," says the Company, "from the way that the grievant conducted himself on the morning of January 10th, that he *knew* he was impaired." (Br. 51) Moreover, in the Company's view, grievant was responsible for his impaired condition. His two previous blackouts, the last one only about two weeks before January 10, 1985, caused him to realize that he had a serious problem with Scotch (Tr. 770-771), yet when he returned to the hotel bar after dinner on January 10 he proceeded to drink two Scotches (Br. 59):

> . . . He did all this knowing that he had just had a blackout only days earlier and that he had a flight scheduled for early the next morning. In doing so, he intentionally placed himself in risk of another blackout and is responsible for the consequences of his actions. The grievant cannot now excuse his continued drinking until 12:30 a.m. by virtue of his blackout. . . .[5]

The Company concludes as follows (Br. 63-64):

> Delta renews its motion to limit the jurisdiction of the System Board. The grievant's employment with Delta was terminated for cause. He violated Delta's no-alcohol policy, Federal Aviation Regulations, and the trust placed in him as a professional airline pilot. The safety rules violated by the grievant are not part of the collective bargaining agreement between Delta and ALPA and there is no contractual agreement to submit safety matters to ar-

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[5] The Company cites these cases in support of its discharge decision: Ozark Air-ALPA, Gr. STL-83-9-1 (Arb. John J. Mikrut, Jr., 1985); Eastern Airlines, 74 LA 316 (Burton B. Turkus, 1980); Trans- World Air, NY-150-74 (Mark L. Kahn 1976); Ozark Airlines, LAX-87-74 (Leo C. Brown, 1975); and Eastern Airlines, 46 LA 549 (Jacob Seidenberg, 1965). All cases cited by the parties have, of course, been reviewed and considered by the Neutral Chairman.

bitration. The System Board does not have jurisdiction to modify, amend or revise the safety rules which the grievant violated. Accordingly, the System Board may not consider the grievant's alcoholism defense. To do so would effectively place the System Board in the position of substituting its judgment for that of Delta's management in an area where the airline has substantial and exclusive responsibility for establishing and enforcing safety rules.

Moreover, the grievant's violation of Delta's safety rules is not to be excused by his claim of alcoholism. At the time that he piloted the Delta jet he knew that he was under the influence of alcohol. His conduct clearly demonstrated that he was aware that he was drunk. Furthermore, the grievant knew from two prior blackouts that he had a serious drinking problem. Although aware of the drinking problem, he failed to take corrective action. On the evening of January 9, 1985, he knowingly placed himself in a position of having another blackout and is responsible for the consequences of his volitional acts.

Hence, the Company says, grievant's discharge was for just cause and his grievance should be denied.

Position of the Association

The Association points out that grievant, at the time of the incident on January 10, 1985, suffered from the as yet undiagnosed disease of chronic alcoholism (Br. 4). The Association notes, and considers relevant, these later events (Br. 2-3):

> . . . Subsequent to his termination [on January 15, 1985], grievant sought evaluation to determine whether he was an alcoholic (T. 737). He went to the Ridgeview Institute near Atlanta, South Miami Hospital and Mount Sinai Hospital in Miami Beach.

> The evaluations at all three institutions indicated that [grievant] was an alcoholic and they recommended in-patient treatment (T. 738-9, ALPA Ex. 4). [Grievant] entered the treatment program at South Miami Hospital March 21, 1985 and remained in the hospital for 28 days (T. 739, ALPA Ex. 4). He received individual therapy, group therapy and counseling in a "highly structured program" (T. 517-8). He is currently [January 1986] in the outpatient phase of treatment or aftercare which includes group therapy for two years (T. 518, 540). He also attends weekly meetings of Birds of a Feather, a pilot AA group (T. 740).
>
> [Grievant] possessses a valid airman's certificate with an airline transport rating (T. 741). The Federal Air Surgeon has determined that medical certification of [grievant] "with appropriate monitoring would not compromise aviation safety." He, therefore, finds him eligible for special issuance of a first class medical certificate when monitoring requirements are arranged (Alpa Ex. 14).

The Association submits that grievant's conduct on January 9 and 10, 1985, "was inextricably tied to his alcoholism." (Br. 11) The Association maintains (Br. 12) that grievant was not aware he was impaired when he boarded Flight 437 on January 10, 1985, because of his blackout the previous night and because of the tolerance and denial characteristics of alcoholism (Br. 14):

> The unrebutted medical evidence in the record establishes not only that alcoholism is a disease (T. 455-60) but also that an individual has not control over whether he will get the disease (T. 509, 624). . . . Since [grievant's] actions were a result of his alcoholism and since an individual is not at fault or responsible for getting alcoholism, there is no justification for imposing discipline based on con-

> duct that is a product of that disease. . . . How can one rationally fix blame when the "perpetrator's" conduct was the result of a condition he was neither aware of nor responsible for?
>
> Certainly if an aircraft accident, involving a violation of Company operating rules, occurred as a result of an undiagnosed epileptic pilot suffering a seizure, or an undiagnosed pilot falling into insulin shock,[6] Delta would not discipline the pilot if the accident were the result of his illness. The evidence indicates that there is no justification for treating an undiagnosed alcoholic who violated Company rules any differently. . . .

Arbitrators, says the Association, have often found that discipline was not for just cause in cases where the misconduct was medically related to the disease of alcoholism (Br. 16).[7] Thus, Arbitrator George Nicolau, in Northwest Airlines-ALPA SBA Docket 82-23, decided October 29, 1984, held (at p. 39):

> Thus, we have an employee, who after 16 years of service, committed serious offenses, but offenses that were the unavoidable consequence of the illness of alcoholism, which illness has been arrested and successfully treated. Our weighing of these factors leads a majority of the Board to conclude that [grievant], despite the seriousness of the infractions, should be given an opportunity to demonstrate . . .

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[6] This example is inapt, since an undiagnosed diabetic pilot would not be taking insulin. The appropriate example for this condition would be a diabetic coma.

[7] The Association cites *Armstrong Cork Co.*, 56 LA 527 (Wolf, 1971); *Standard Packaging Co.*, 71 LA 445 (Fogelberg, 1978); *Air Wisconsin, Case No. AW-8-81* (Seidenberg, August 11, 1983); *Northwest Airlines, Inc.*, System Board Docket 82-23 (Nicolau, October 29, 1984); and others.

that he can meet the Company's standards for flying.[8]

The Association calls particular attention to the decision of this System Board, with Abitrator James F. Scearce serving as Neutral Member, in *Cantrell*, ALPA 11-83 (ATL), decided August 4, 1985. Cantrell, at B-767 First Officer, had a scheduled trip departure from ATL at 2:45 P.M. on November 8, 1983. As stated in the Chairman Scearce's Opinion:

> . . . The record shows that the grievant changed into a uniform, checked in and then went to concourse/gate to perform the regular pre-flight walkaround. The grievant completed such duties and

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[8] It is pertinent to note here that Northwest Airlines challenged this System Board award in Federal District Court. *Northwest Airlines, Inc. v. Air Line Pilots Association, International*, 633 F. Supp. 779 (D.D.C. 1985), decided 11-27-85. (See Co. Br. pp. 6-10.) This Court reversed the Nicolau decision, finding that it "significantly encroaches on Northwest's responsibilities to the air travelling public. . . . Under the guise of a debate over policy and rules, the Board's decision substitutes its own policy for Northwest's." On appeal by the Association, however, the judgment of the District Court was reversed (No. 85-6228, D.C. Cir., decided 1-6-87). The C.C.A. asserted:

> . . . [T]he conclusion is inescapable that the Board acted within its authority in considering [grievant's] claim that he had been fired without "just cause." And in reviewing this grievance, it is equally plain that the Board was authorized to judge the legitimacy of the disciplinary penalty in the light of mitigating circumstances. . . . The fact that the arbitration touches on issues related to airline safety is irrelevant. There have been numerous arbitrations under the RLA involving grievances that implicate safety issues, and no court has ever ruled that an arbitral board lacked jurisdiction to consider such issues.

This Opinion in no way relies on the above Court decision, which appeared too recently to be part of the record. The ruling of this System Board concerning its jurisdiction (Tr. 40-41, *infra* pp. 26-27) does appear to be consistent with the view expressed by the Court of Appeals as quoted above.

> went to the cockpit, at which time he learned that a mechanical problem had been found which would delay the flight departure. He apparently left the cockpit and went to the galley area where a flight attendant detected the odor of alcohol on his breath and reported as much to her supervisor. The Chief Pilot at Atlanta was contacted and advised of the situation; he confronted the grievant with such circumstance. Whereupon, the grievant admitted that while he traveled from D/FW at ATL on Flight 1020 [arriving about 36 minutes before his scheduled 2:45 P.M. departure] he was in civilian clothes and consumed two scotches and sodas. . . .

F/O Cantrell was discharged. The System Board decided he should be reinstated without back pay and stated (at pp. 13-14):

> . . . [T]he Company has concluded that alcohol abuse is a problem and has structured and effected a program at considerable expense in an effort to salvage deserving employees. Such an enlightened approach can be expected to recognize exceptions where unusual circumstances exist. This Board finds sufficient basis to conclude that grievant meets such exceptions and is deserving of another opportunity to prove his worth. . . . The grievant will, of course, have to meet the physical, flight and other qualifications attendant to his position. The particular and individual circumstances of this case, including his discipline-free and satisfactory prior record and his own efforts of recovery form the basis to provide him a special opportunity to return to duty.

The Association cites other cases in which arbitrators "recognized that rehabilitative efforts, even after discharge, should be considered as mitigating factors when evaluating the Company's disciplinary action." (Br. 20-21)

The Association maintains that such mitigating factors are present in this case, since grievant has engaged in a successful rehabilitation effort (Br. 21):

> [Grievant] voluntarily entered in-patient treatment on March 21, 1985 and was discharged on April 18, 1985. In September [1985], Dr. David Millett, Director of Flight Medicine for Eastern Air Lines, wrote that since his release from the hospital [grievant] maintained a vigorous aftercare program. . . ." He further stated "It is my belief that Captain Day has done very well, and I believe that he will maintain his sobriety." On December 2, 1985 Dr. Carone, a psychiatrist, and Dr. Krinsky, a psychologist, wrote about Captain Day as follows:
>
> > It's gratifying to note that the signs of progress have continued. He is pleasant, friendly and continues to impress us as free of any major psychopathology. The overall impression we gain is that his insight has deepened and his judgment is better. At the same time, his motivation to attain and then maintain sobriety is even stronger than it was previously.

The Association also cites the testimony of Lynn Hankes, M.D., director of the Addiction Treatment Program at South Miami Hospital (where grievant was hospitalized for alcoholism), that grievant was doing the things that were necessary for a sustained recovery and that his prognosis is excellent (Tr. 534, 536). The Association therefore urges (Br. 22):

> . . . Overturning his [grievant's] termination would be consistent with arbitral precedent in this industry as well as with the rehabilitative approach to alcoholism adopted by the FAA. It would also be consistent with the precedent established by this System Board on this property [*Cantrell*]. Day's 19 year discipline free record (T. 713, 166) and his recov-

ery, rehabilitation and recertification bring him within the ambit of the prior award on this property.

The Association also contends that grievant has been subjected to disparate treatment in comparison to the other cockpit crew members involved in the incident of January 10, 1985. F/O Rothbart and S/O Voorhees were both charged by the Company with being "aware of the obvious fact that the Captain appeared to be intoxicated, yet you . . . willfully participated in the conduct of the flight as crewmembers." (See above, p. 9) Although the Flight Operations Procedures Manual (FOPM) declares that this made grievant's fellow crew members "equally guilty" (see above, p. 10), the Company failed to apply its own policy to them. Neither Rothbart nor Voorhees was discharged. (Br. 23-24)

The Association maintains that there has also been discrimination between grievant and other Delta pilots who violated the rule in the same FOPM that "evidence of the use of alcohol . . . at the time of reporting for flight duty, also constitutes reason for discharge." Specifically, pilots Tarr, Rotchford and O'Shea (see above, pp. 14-15) all reported for flight duty showing evidence of alcohol use but were not discharged. Cantrell's discharge was reversed by the System Board (see above, p. 20). The Association says (Br. 25-26):

> Captain Day is apparently the first and only Delta pilot to be terminated for violating the FOPM provision prohibiting evidence of the use of alcohol *at the time of reporting for flight duty*. . . . The only difference between Captain Day's incident and these other cases, and perhaps the other 100 currently employed Delta pilots who have been treated for alcoholism (Tr. 403) is that someone stopped the alcoholic pilot and kept him from operating under the influence. . . .
>
> Captain Day's disparate treatment from other Delta pilots involved in similar rules violations can-

> not be justified. The rule prohibits *reporting* under the influence. The actual violation in this case, therefore, is identical to the violations of Tarr, Rotchford and O'Shea in that they all reported for duty under the influence. The difference between those cases and the instant case is the fortuitous intervention of another party. This intervention did not occur as a result of any action by Tarr, Rotchford, O'Shea or Cantrell. Captain Day is not responsible for the fact that for whatever reason, no one intervened to stop him. . . .

The Association emphasizes that all three medical experts who testified in this case "agreed that medically there was no difference either in terms of treatment or diagnosis between the pilot who flew under the influence and a pilot who stopped short of that." (Br. 27). Thus, Company witness Joseph Westermeyer, M.D., testified (Tr. 967):

> Q. So that whatever the proper solution is, you wouldn't distinguish between a person who operates the plane—
>
> A. Right.
>
> Q. —and the person who is stopped before he actually operates it?
>
> A. Yes. Twenty years of experience suggests to me that the individual who takes step one is not going to do things along the way to make it stop happening. In other words, once they've set this thing in action, they're going to carry it through as far as they can go. . . .

The Association acknowledges the Company's responsibility for the safety of the public and its employees, but it asserts that grievant's reinstatement would not constitute any threat to safey: "His disease is in remission and he is doing what is necessary to sustain his recovery. His prognosis is excellent and he is medically

safe to fly." (Br. 31) The Association also cites the conclusion of Drs. Carone and Krinsky on December 2, 1985, that "from a psychiatric/psychological standpoint, we believe that he is ready for a return to flying status." The Association adds that the FAA's position on grievant's condition supports this conclusion, and observes (Br. 32):

> Since 1976, the FAA has had a procedure for and has, in fact, recertified alcoholic air line pilots. Nearly 600 alcoholic air line pilots had been recertified as of December 31, 1984. This recertification . . . only occurs if the Federal Air Surgeon the duties of the airman "can be performed without endangering air commerce. . . ." . . . [T]he Federal Air Surgeon determined that medical certification in this case would not compromise aviation safety and did find Captain Day eligible for special issuance of a medical certificate.

Moreover, says the Association, the Company "readily acknowledges that alcoholic pilots can undergo successful rehabilitation and return to work without compromising safety", as demonstrated by Delta's own Alcohol Rehabilitation Program and the fact that about one hundred treated alcoholics are currently flying for Delta. In the Association's view, the Company has failed to provide any factual basis for distinguishing grievant's status from these one hundred other rehabilitated alcoholic pilots.

The Association also argues that the Company has failed in grievant's case to adhere to its own Alcohol Rehabilitation Program. Section 1026.2-C is pertinent:

> C. *Compulsory Confrontation*
>
> 1. The individual is confronted as a result of on-the-job problems or misconduct.
>
> 2. Immediate disciplinary action will be taken; and

> 3. The individual will be advised of termination alternative if he or she does not participate in and successfully complete the program.

Thus, says the Association (Br. 34): "The Program contemplates discipline short of termination since it provides for discipline *and* the choice of participation in the Program or termination." The only other reference to termination is in Section 1026.1, ¶ 3, where it provides that "failure to comply with the requirements [of the Program] will subject him/her to immediate termination of his/her services with Delta." The Association submits (Br. 35) that, since grievant was never given an opportunity to enter the Program, he did not fail to comply with its requirements and his immediate termination was not justified.

As to the implications for air safety of grievant's discharge, the Association comments (Br. 37):

> . . . Moreover, this punitive approach discourages, rather than encourages, pilots from coming forward or fellow pilots from intervening on behalf of another pilot. If a pilot knows his colleague will be terminated for a rule violation he'll be more apt to "cover" for him and less apt to intervene and bring the problem to the Company's attention for solution (Tr. 606, 698). Thus, there really is no persuasive rationale to support the termination of Captain Day.

The Association concludes that the grievance should be granted in full and urges the following remedy (Br. 38):

> The grievant should be reinstated with his seniority unimpaired. He should be treated retroactively in conformity with the Company's Alcohol Rehabilitation Program and should be made whole for losses he may have suffered as a result of the Company's failure to treat him in accordance with that Program. He should receive compensatory back pay

from the date the FAA certified that he was eligible to receive a special issue airman medical certificate, January 16, 1986. On that date he was legally able to return to flying. Upon reinstatement he should be allowed to exercise his seniority as a pilot returning from sick leave.

Discussion

I have presented, above, the salient facts and major arguments of the parties. The record of this case is a substantial one: the testimony of thirteen witnesses, 979 transcript pages, 25 exhibits, many cited court and arbitration decisions, and 147 pages of briefs. Accordingly, I have not attempted to recapitulate every item of evidence and each line of argument, and the parties should understand that my analysis of this dispute is based on the complete record.

As a threshold matter, this Opinion should first consider the position of the Company in regard to the jurisdiction or authority of the System Board in this type of safety-related case. The Company, at the outset of the System Board hearing, asserted the following position (Tr. 12-13):

> . . . So what I would urge the Board is that its jurisdiction is limited in this case to determine whether or not there was a violation of Delta's safety rules prohibiting the operation of an aircraft while under the influence of alcohol, and if, in fact, the violation did occur and the evidence of the case supports that violation, then the Board . . . [should] uphold the termination of the pilot involved. And the Board simply does not have jurisdiction to make exceptions to that safety-based policy or to otherwise interpret it or apply it.

The System Board, after hearing substantial argument on this matter, ruled as follows (Tr. 45-46):

> With regard to the Company's position on what we call the limits of the Board's jurisdiction, the simplest way to put it is: the Board does not accept that limitation on its jurisdiction. . . . In principle, the Board has the right to entertain, for example, an allegation or claim that a Company-formulated rule is unreasonable; or that in a particular application a reasonable rule has not been reasonably applied. Obviously, if a reasonable rule has been reasonably applied and appropriate action has been taken, then presumably the grievance should be denied; but these are all matters that fall within the Board's authority.

This Neutral Chairman has reconsidered the issue in response to the Company's renewal of its motion (see above, p. 16) and finds no reason to modify the System Board's original ruling.

As to the facts of this case, there is no need to now review or describe them in any detail. They are not in significant dispute. Grievant is an alcoholic. He succumbed to his disease of alcoholism on January 9 and 10, 1985, when he ingested a considerable quantity of alcohol (beer, wine and Scotch whiskey) in violation of the Company's (then) 24-hour rule and the FAA's eight-hour rule. He reported for Flight 437 on January 10, 1985, under the influence of alcohol and flew this Bangor-Boston trip as Captain despite his impaired condition.[9] A blood

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[9] The testimony of grievant and his fellow flight crew members is that grievant actually handled the flight controls and flew this Bangor-Boston trip competently and without incident in spite of his inebriated condition. There were no other witnesses to what actually transpired in the cockpit, and both parties have accepted as a fact that grievant did operate the flight controls. I am not convinced of this. Under the circumstances, of course, the trip would have been a far safer one with the First Officer at the controls. In regard to the issues presented by this case, however, it makes no difference, in my judgment, whether it was the intoxicated Captain or the First Officer who actually handled the flight.

alcohol test administered to grievant at 11:33 A.M. on January 10, 1985, indicated approximately 0.13 grams percent alcohol (well above the usual d.u.i. standard of 0.10) when grievant commenced Flight 437 at about 7:05 A.M. that morning.

Grievant was discharged on January 15, 1985, for these violations of Company and FAA rules. F/O Rothbart was issued a one-year disciplinary suspension, later reduced by the Company to four months, for violating the 24-hour rule and for participating in the flight although aware that grievant appeared to be intoxicated. S/O Voorhees, on the same grounds, was issued a six-month disciplinary suspension, later reduced by the Company to three months. Subsequently, the four-member System Board reduced their penalties to three months and two months, respectively.

It will be useful, at this juncture, to review the Company's policies in regard to alcohol usage by pilots. These policies, and how they have been communicated and applied, establish the context within which the Board must determine whether just cause existed for grievant's discharge.

The Company's published policy, as it relates to flight crew members, appears in Section 3 of the Flight Operations Procedures Manual (see above, p. 10, for the FOPM provisions in effect as of January 1985). Paragraph 3 of this policy declares that "Any evidence of the use of alcohol or other drugs which is apparent at the time of reporting for flight duty also constitutes reason for discharge."

The Company's actual policy, as manifested by not only by its actions in specific cases but also by its evidence and argument in this case, differs significantly from what is asserted in the FOPM. In actuality, says the Company, automatic discharge would apply only to the pilot who reports to the aircraft under the influence

of alcohol. In order to encourage other employees to intervene so as to prevent the impaired pilot from reaching the aircraft after he reports for duty, the Company will "evaluate all of the circumstances." (See above, pp. 12-13.) As Captain Harry Alger, Assistant Vice President for Operations, testified on behalf of the Company (Tr. 976-7):

> Q. Will the pilot who reports to the cockpit under the influence of alcohol always be terminated?
>
> A. Yes, sir.
>
> Q. Okay. Will the pilot who reports and signs in but is detected prior to making it to the cockpit always be terminated?
>
> A. That will be discretionary discipline.
>
> Q. Will that be a fact case-by-case determination?
>
> A. Certainly, certainly.
>
> Q. And why does Delta reserve the right to have that discretion between the time of sign-in and the time the man reports to the aircraft?
>
> A. Well, I think that something short of termination is the appropriate discipline. Discipline is appropriate, probably appropriate, but not termination.
>
> Q. Okay. And you feel that's necessary to retain that discretion in order to break the conspiracy of silence that exists among pilots?
>
> A. Yes, yes, absolutely.

The pilot who reports for duty while under the influence of alcohol, but who is intercepted and does not get on the plane, would be subject to the "compulsory confrontation" option of the Company's Alcohol Rehabilitation Program: either enter the Alcohol Rehabilitation Program and complete it successfully or be terminated (see above, p. 24). Grievant was not offered this option on January 10, 1985, because he was not intercepted, did enter the aircraft, and served as Captain during the Bangor-Boston flight. It is a reasonable inference that if griev-

ant had been intercepted, given his nineteen years of satisfactory pilot service, he would not have been discharged.

Another difference between the FOPM and actual policy relates to the first paragraph of Section 3, which sets forth the 24-hour no-alcohol rule (see above, p. 10). There is undisputed testimony by grievant (Tr. 721, 778-9), by F/O Rothbart (Tr. 346-350) and S/O Voorhees (Tr. 285-6) that violations of this rule were commonplace and that the Company made no serious effort to enforce it. The validity of this testimony is supported by the Company's decision, later in 1985 (after grievant's discharge), to eliminate the 24-hour rule and instead to adopt the FAA's eight-hour rule.[10]

Finally, at least in the judgment of the Neutral Chairman, the Company failed in this case to apply the unequivocal mandate of the fourth paragraph of FOPM Section 3, a provision that appears in bold-face type:

> **Any flight crew member who knowingly permits another flight crew member to attempt to perform his flight duty while under the influence of intoxicants or drugs shall be considered equally guilty.**

The discipline notices issued to each of grievant's fellow flight crew members (see above, p. 9) asserted that they had violated this rule. Although therefore just as guilty as grievant ("equally guilty") under the published policy, neither was discharged. Their initial penalties were subsequently reduced, according to Captain Alger (Tr. 432-5), in part because they adhered to their claim of not being aware that grievant was intoxicated and were given the benefit of the doubt on this point by the Company. The critical point, here, is that even when the Company considered Rothbart and Voorhees to have been

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[10] Captain Alger testified that the Company's decision to reduce the penalties initially imposed on F/O Rothbart and on S/O Voorhees was based in part on the change from a 24-hour rule to an 8-hour rule (Tr. 425, 431-5).

in violation of this paragraph, they were issued lesser penalties than grievant.

The record leaves no doubt in this arbitrator's mind that F/O Rothbart and S/O Voorhees must have known that grievant was impaired.[11] Although they are not "on trial" before this Board, their actions impacted significantly on grievant's fate. Their obvious responsibility was to have stopped grievant from taking that flight. Had they done so, Company policy indicates that grievant would not have been discharged and he would have been offered the option of the Alcohol Rehabilitation Program. In addition, an intolerably hazardous incident would have been avoided. Why didn't Rothbart and Voorhees "intercept" grievant, prevent him from boarding the flight, and thus—under the Company's policy as enunciated at the System Board hearing—promote safety

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[11] It would serve no useful purpose to assess in detail all of the evidence bearing upon this conclusion. It will suffice, at this juncture, to note that three Flight Attendants on board Flight 437 along with the last boarding passenger had no doubt that grievant was drunk; that Captain Baker, at Boston, had a similar impression; that the First Officer (who had earlier advised the rest of the crew that grievant was "out cold") assisted grievant into the aircraft (I do not credit his contradictory testimony); that the Flight Attendants were effectively excluded from observing or entering the cockpit immediately after the Captain's arrival; that S/O Voorhees barely opened the cockpit door in response to F/A Surette's knock and blocked her view; that when Voorhees went to the galley for coffee, and Surette repeated the charge that grievant was drunk, Voorhees returned to the cockpit and passed a note to Rothbart saying, "We got trouble with the F/A's"; that Rothbart then directed Voorhees to disconnect the cockpit voice recorder so that the "problem" could be discussed; that at no time during the trip did the flight crew permit or invite a Flight Attendant into the cockpit; and that after landing at Boston, grievant slipped away to get coffee while Rothbart sought to convince the three Flight Attendants still in the cabin that nothing was wrong. Of course, as later established by the blood alcohol test, grievant was in fact substantially "under the influence" during the flight.

and save grievant's job? I must infer that it was because they were not aware of this Company policy.

Nothing in the record indicates that the Company has advised its pilot group that a pilot who reports for work under the influence of alcohol but who is intercepted before he gets to the plane will probably not be discharged, but that if this pilot enters the plane his discharge will be automatic. The FOPM says only that *reporting* for flight duty under the influence is cause for discharge.

The Company, in other words, has not effectively implemented the policy it claims to have designed to encourage interception in the interest of flight safety. Surely, if grievant's fellow crew members had understood that the best way to protect grievant (and themselves) was to keep him off the aircraft, this is what they would have done. Instead, they helped grievant to board and serve on Flight 437 while attempting to conceal his impaired condition.

As the Association contends and as the medical evidence indicates, any pilot who reports for duty under the influence of alcohol intends to get on the plane and fly the trip (see above, p. 23). This will happen unless someone intercepts the pilot and keeps him from boarding. One must therefore infer that the pilot who reports for duty while intoxicated but is intercepted has the same faulty judgment as the intoxicated pilot who is not intercepted. The Company asserts, however, that the intercepted pilot will probably not be discharged and can return to the flight deck if and after he is successfully rehabilitated and satisfies FAA requirements. The Company does not deem such a pilot a threat to safety. If that is so, then a non-intercepted pilot who is similarly rehabilitated and meets all FAA requirements can also safely return to the flight deck.

The troublesome element in this case is that under the Company's model scenario grievant should have been

intercepted, and the fact that he was not intercepted was not grievant's fault but that of his fellow crewmembers. Moreover, as noted above, the Company, by having failed to communicate effectively its real interception policy, must share in the responsibility for the non-interception. Finally, as also noted above, the Company did not implement its explicit "equally guilty" rule among all the members of the flight crew, so that grievant's discharge emerges as disparate treatment.

The Company says (see above, p. 14) that "It has consistently drawn the line at reporting to the aircraft, and has terminated the employment of all pilots who crossed that line." So far as the record indicates, however, only three pilots who reported for duty under the influence of alcohol did cross that line: O'Shea, Cantrell and grievant. O'Shea's flight was cancelled by his fellow crew members when they became aware of his condition and O'Shea was reinstated by the Company after being initially discharged. Cantrell, who performed preflight duties but was turned in by a Flight Attendant after a mechanical problem delayed the departure, was discharged but reinstated by the System Board. This record can hardly be deemed a "past practice" supporting the assertion of the Company that it *has terminated* the employment of all pilots who reported to the aircraft while under the influence of alcohol.

Grievant appears to be the first example of a pilot who actually flew a trip under the influence of alcohol. Although this consequence of his alcoholism—and I am persuaded that grievant was indeed an alcoholic—was egregious, grievant's case is not logically distinguishable, from a disciplinary perspecitve, from that of the intoxicated pilot who reports for duty but is fortunately intercepted.

I find, in light of the foregoing considerations as well as the mitigating factor of grievant's nineteen satisfac-

tory years of prior pilot service, that under the circumstances of this case grievant should have been offered the option of entering the Company's Alcohol Rehabilitation Program. Since grievant has pursued a rehabilitation program with effective results thus far, his discharge should be rescinded and the costs of his rehabilitation program reimbursed by the Company on the same basis as if grievant had not been discharged and had accepted the rehabilitation option.

On the other hand, it is my view that grievant is not otherwise entitled to be made whole for earnings and other benefits lost as a consequence of his misconduct on January 9-10, 1985. He did commit a dischargeable offense. If not for his long record of competent service and the Company's failure in this instance to implement its own alcohol policy with rigor and equity, I might have found just cause for his termination. Accordingly, a make-whole remedy—apart from the costs of his rehabilitation—is not appropriate.

This Opinion should not be interpreted as expressing a judgment on the reasonableness of any particular aspect of the Company's present policies relating to alcohol consumption and abuse. The System Board's mission here is solely to determine whether, in grievant's specific case, there was just cause for his discharge. In my view, there was not.

MARK L. KAHN
/s/ Mark L. Kahn
Neutral Chairman
Delta Air Lines Pilots' System
Board of Adjustment

DATED: January —, 1987

DELTA AIR LINES PILOTS'
System Board of Adjustment

ALPA Case #1-85
William D. Day

AWARD OF SYSTEM BOARD

The discharge of Captain William D. Day on January 15, 1985, was without just cause although he did commit serious misconduct. Accordingly, grievant shall be offered reinstatement, but without back pay and related benefits, and shall be reimbursed by the Company for the costs of his rehabilitation in the same manner and to the same extent as though he had been offered and had accepted the option of entering the Company's Alcohol Rehabilitation Program.

The Company is directed to cooperate with grievant and with the Federal Aviation Administration in relation to the procedures, outlined in the FAA's letter to grievant dated January 16, 1985, whereby grievant may be granted special issuance of a first-class airman medical certificate.

The System Board retains jurisdiction for 180 days over any dispute that may arise in connection with the implementation of this Award.

/s/ Richard Colby
RICHARD COLBY
ALPA Member

/s/ John Moran
JOHN MORAN
Company Member
*Dissenting

/s/ James Suckow
JAMES SUCKOW
ALPA Member

/s/ C. A. Smith
C. A. SMITH
Company Member
*Dissenting

/s/ Mark L. Kahn
MARK L. KAHN, Neutral Chairman

DATED: January —, 1987 *Dissenting Opinion attached.

DELTA AIR LINES PILOTS SYSTEM BOARD
OF ADJUSTMENT

ALPA Case #1-85

William D. Day

DISSENTING OPINION

The Majority Opinion and Award in this case is contrary to public policy and the Federal Aviation Act. It clearly exceeds the jurisdiction and authority of the System Board of Adjustment.

The evidence in this case unequivocally establishes that William D. Day piloted a Delta flight while under the influence of alcohol contrary to the Company's Flight Operations Procedures Manual and the Federal Aviation Regulations. Public policy and the Federal Aviation Act require that the Company perform its flight operations with the "highest possible degree of safety in the public interest." This obligation requires that the Company permanently remove from duty pilots who compromise safety by operating while under the influence of alcohol or drugs. Mr. Day's conduct warranted his termination. Even the Neutral Chairman found that he committed "a dischargeable offense." In reinstating Mr. Day, the System Board clearly exceeds its authority and jurisdiction and contravenes public policy. We therefore dissent.

/s/ C. A. Smith
C. A. SMITH
Company Member

/s/ John Moran
JOHN MORAN
Company Member

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-8839

D.C. Docket No. 87-239

DELTA AIR LINES, INC.,
Plaintiff-Counter-claimant
Defendant-Appellee,
Cross-Appellant,

versus

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,
Defendant-Counter-claimant
Plaintiff-Appellant,
Cross-Appellee.

Appeals from the United States District Court for the Northern District of Georgia

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Before HILL and FAY, Circuit Judges, and DUBINA*, District Judge.

JUDGMENT

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and were argued by counsel;

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* Honorable Joel F. Dubina, U.S. District Judge for the Middle District of Alabama, sitting by designation.

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the District Court appealed from, in these causes be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED that defendant-counter-claimant plaintiff-appellant, cross-appellee, pay to plaintiff-counter-claimant defendant-appellee, cross-appellant, the costs on appeal to be taxed by the Clerk of this Court.

Entered: December 8, 1988

For the Court: MIGUEL J. CORTEZ
Clerk

By /s/ Karleen McNabb
Deputy Clerk

Issued as Mandate: Feb. 8, 1989

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-8839

DELTA AIR LINES, INC.,
Plaintiff-Counter-Claimant
Defendant-Appellee,
Cross-Appellant,

versus

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,
Defendant-Counter-Claimant
Plaintiff-Appellant,
Cross-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING IN BANC

(Opinion December 8, 1988, 11 Cir., 198—,
——F.2d——).

(January 23, 1989)

Before HILL and FAY, Circuit Judges, and DUBINA*, District Judge.

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* Honorable Joel F. Dubina, U.S. District Judge for the Middle District of Alabama, sitting by designation.

PER CURIAM:

(√) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ James C. Hill
United States Circuit Judge

RELEVANT STATUTES

RAILWAY LABOR ACT: 45 U.S.C. § 153

§ 153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of sections 151a and 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with sections 151a and 152 of this title and is otherwise properly qualified to participate in the selection of

the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with sections 151a and 152 of this title and which represent employees in engine, train, yard, or hostling service: *Provided, however*, That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division: *Provided further, however*, That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispute submitted to the First Division.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, powerhouse employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full

statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however*, That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the

awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the pro-

ceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however*, That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the di-

vision to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice

chairman: *Provided, however,* That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this chapter, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this chapter and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same proc-

esses. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (*l*) of this section, with respect to a division of the Adjustment Board.

Second. System, group or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by

such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure

to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

RAILWAY LABOR ACT: 45 U.S.C. § 184

§ 184. System, group, or regional boards of adjustment

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in

accordance with the provisions of this subchapter, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this chapter shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this subchapter, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

FEDERAL AVIATION REGULATIONS: 14 C.F.R. § 91.11

§ 91.11 Alcohol or drugs.

(a) No person may act or attempt to act as a crewmember of a civil aircraft—

(1) Within 8 hours after the consumption of any alcoholic beverage;

(2) While under the influence of alcohol;

(3) While using any drug that affects the person's faculties in any way contrary to safety; or

(4) While having .04 percent by weight or more alcohol in the blood.

(b) Except in an emergency, no pilot of a civil aircraft may allow a person who appears to be intoxicated or who demonstrates by manner or physical indications that the individual is under the influence of drugs (ex-

cept a medical patient under proper care) to be carried in that aircraft.

(c) A crewmember shall do the following:

(1) On request of a law enforcement officer, submit to a test to indicate the percentage by weight of alcohol in the blood, when—

(i) The law enforcement officer is authorized under State or local law to conduct the test or to have the test conducted; and

(ii) The law enforcement officer is requesting submission to the test to investigate a suspected violation of State or local law governing the same or substantially similar conduct prohibited by paragraph (a)(1), (a)(2), or (a)(4) of this section.

(2) Whenever the Administrator has a reasonable basis to believe that a person may have violated paragraph (a)(1), (a)(2), or (a)(4) of this section, that person shall, upon request by the Administrator, furnish the Administrator, or authorize any clinic, hospital, doctor, or other person to release to the Administrator, the results of each test taken within 4 hours after acting or attempting to act as a crewmember that indicates percentage by weight of alcohol in the blood.

(d) Whenever the Administrator has a reasonable basis to believe that a person may have violated paragraph (a)(3) of this section, that person shall, upon request by the Administrator, furnish the Administrator, or authorize any clinic, hospital, doctor, or other person to release to the Administrator, the results of each test taken within 4 hours after acting or attempting to act as a crewmember that indicates the presence of any drugs in the body.

(e) Any test information obtained by the Administrator under paragraph (c) or (d) of this section may be

evaluated in determining a person's qualifications for any airman certificate or possible violations of this chapter and may be used as evidence in any legal proceeding under section 602, 609, or 901 of the Federal Aviation Act of 1958.

FEDERAL AVIATION REGULATIONS: 14 C.F.R. § 67.19

§ 67.19 Special issue of medical certificates.

(a) At the discretion of the Federal Air Surgeon, a medical certificate may be issued to an applicant who does not meet the applicable provisions of § 67.13, § 67.15, or § 67.17 if the applicant shows to the satisfaction of the Federal Air Surgeon that the duties authorized by the class of medical certificate applied for can be performed without endangering air commerce during the period in which the certificate would be in force. The Federal Air Surgeon may authorize a special medical flight test, practical test, or medical evaluation for this purpose.

(b) The Federal Air Surgeon may consider the applicant's operational experience and any medical facts that may affect the ability of the applicant to perform airman duties including:

(1) The combined effect on the applicant of failure to meet more than one requirement of this part; and

(2) The prognosis derived from professional consideration of all available information regarding the airman.

(c) In determining whether the special issuance of a third-class medical certificate should be made to an applicant, the Federal Air Surgeon considers the freedom of an airman, exercising the privileges of a private pilot certificate, to accept reasonable risks to his or her person and property that are not acceptable in the exercise

of commercial or airline transport privileges, and, at the same time, considers the need to protect the public safety of persons and property in other aircraft and on the ground.

(d) In issuing a medical certificate under this section, the Federal Air Surgeon may do any or all of the following:

(1) Limit the duration of the certificate.

(2) Condition the continued effect of the certificate on the results of subsequent medical tests, examinations, or evaluations.

(3) Impose any operational limitation on the certificate needed for safety.

(4) Condition the continued effect of a second- or third-class medical certificate on compliance with a statement of functional limitations issued to the applicant in coordination with the Director of Flight Operations or the Director's designee.

(e) An applicant who has been issued a medical certificate under this section based on a special medical flight or practical test need not take the test again during later physical examinations unless the Federal Air Surgeon determines that the physical deficiency has become enough more pronounced to require another special medical flight or practical test.

(f) The authority of the Federal Air Surgeon under this section is also exercised by the Chief, Aeromedical Certification Branch, Civil Aeromedical Institute, and each Regional Flight Surgeon.

Supreme Court, U.S.
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No. 88-1901

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

DELTA AIR LINES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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18 pp

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether an arbitration award directing a commercial airline to reinstate a pilot who was discharged for having flown a passenger-carrying aircraft while drunk was properly set aside as contrary to public policy.

2. Whether an arbitration award directing a commercial airline to reinstate a pilot who was discharged for having flown a passenger-carrying aircraft while drunk conforms with and confines itself to matters within the jurisdiction of the arbitrator by relying on a post-discharge diagnosis of alcoholism as its basis.

LIST OF PARTIES

The names of all parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit appear in the caption of the case in this Court.[1]

[1] Pursuant to Supreme Court Rule 28, the following is a listing of all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of Delta Air Lines, Inc.: Atlantic Southeast Airlines, Inc.; Comair, Inc.; and Gatwick Handling, Ltd.

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IN THE

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No. 88-1901

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

DELTA AIR LINES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

Respondent, Delta Air Lines, Inc., respectfully urges denial of the Petition for a Writ of Certiorari filed by the Air Line Pilots Association, International ("ALPA") to review the judgment and order entered by the United States Court of Appeals for the Eleventh Circuit on December 8, 1988.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES AND REGULATIONS INVOLVED

Certain provisions of the Railway Labor Act, 45 U.S.C. § 153 and § 184, and of the Federal Aviation Regulations, 14 C.F.R. § 91.11(a), are involved in this case. Those provisions are set forth at pp. 81a to 93a of the Appendix to the Petition.

Additionally, the Federal Aviation Act, 49 U.S.C. § 1421(b), provides that:

> In prescribing standards, rules and regulations, and in issuing certificates under this subchapter, the Administrator shall give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest and to any differences between air transportation and other air commerce; and he shall make classifications of such standards, rules, regulations, and certificates appropriate to the differences between air transportation and other air commerce. The Administrator may authorize any aircraft, aircraft engine, propeller, or appliance, for which an aircraft certificate authorizing use thereof in air transportation has been issued, to be used in other air commerce without the issuance of a further certificate. The Administrator shall exercise and perform his powers and duties under this chapter in such manner as will best tend to reduce or eliminate the possibility of, or recurrence of, accidents in air transportation, but shall not deem himself required to give preference to either air transportation or other air com-

merce in the administration and enforcement of this subchapter.

STATEMENT OF THE CASE

I. The Relevant Facts

Around 2:00 p.m., on January 9, 1985, William Douglas Day, a Delta Captain, arrived in Bangor, Maine, where he had a scheduled layover before he was to serve as the Pilot-In-Command of Delta Flight 437 to Boston at 7:05 a.m. the next morning. During that layover, Day drank unknown quantities of scotch whiskey, as well as wine and beer, and became extremely intoxicated. Day has no idea how much alcohol he drank nor does he know when he stopped drinking, though he admits to drinking scotch until at least 12:30 a.m.

Just prior to the scheduled departure, Day arrived at the airport. He needed the assistance of his first officer just to be able to board the aircraft. Witnesses described his appearance as "frightening." His eyes were glazed, his face was red and swollen, and he smelled very strongly of alcohol. Only with the help of others was he able to enter the cockpit.

Flight attendants reported being alarmed that Day was in the cockpit, obviously drunk. Their objections to having a drunk flying the plane, however, went unheeded. During the flight, at least one passenger voiced his concern about Day's condition and told a flight attendant that, "if you don't take care of it, I will."

When the flight attendants continued to express their concerns over Day's condition, the Cockpit Voice Recorder was deliberately disconnected while the crew

discussed the situation. Day, the final authority as to the operation of the aircraft as its Pilot-In-Command, was aware that the Cockpit Voice Recorder had been disconnected and that that was a serious violation of the Federal Aviation Regulations. At all times throughout the flight, Day served as the Pilot-In-Command, personally manipulating the controls.

After arriving in Boston, the flight attendants as well as one of the passengers reported to Delta management that the Captain was drunk. Day and the first and second officers were directed to submit to a blood-alcohol test. While the blood tests administered to the first and second officers were both negative, the results of Day's test indicated a blood alcohol content of around .13 grams percent alcohol at the time he piloted Flight 437. Based on his violations of Delta Flight Operations Procedures and the Federal Aviation Regulations by operating the aircraft while intoxicated, Day was terminated on January 15, 1985.

At no time prior to his discharge did Day suggest that he might have an alcohol problem. Only after Delta had denied a grievance filed on his behalf did Day decide to seek a diagnosis that could be presented at the subsequent arbitration hearing.

Following a hearing in January, 1986, the Delta Air Lines Pilots' System Board of Adjustment issued its decision, finding that Day had indeed operated the aircraft while intoxicated. Although declaring that he had thereby committed a "dischargeable offense," a majority of the System Board, in a 3 to 2 opinion, ruled that Day should have been offered the option of entering the Delta alcohol rehabilitation program, instead of being terminated. In so ruling, the majority

noted that Day's first and second officers were only suspended, not discharged, and that, on three previous occasions, crew members under the influence of alcohol had been intercepted prior to reporting to the aircraft and were not dismissed. The two dissenting System Board members determined that Delta had just cause to terminate Day's employment.

The majority of the System Board awarded Day reinstatement without backpay. Delta was directed to reimburse Day for the costs of his alcohol rehabilitation program and "to cooperate with [Day] and with the Federal Aviation Administration in relation to the procedures . . . whereby [Day] may be granted special issuance of a first-class airman medical certificate."

II. The Proceedings Below

On February 12, 1987, Delta filed a complaint in the United States District Court for the Northern District of Georgia, seeking to have the arbitration award set aside. In partially granting Delta's summary judgment motion, that Court found that enforcement of the award directing Day's reinstatement would violate the clearly established public policy against allowing pilots to operate aircraft under the influence of alcohol. That well-defined and dominant policy was codified in Federal Aviation Regulations and elsewhere, and the public safety implications resulting from a violation of that policy were enormous. Accordingly, those portions of the award directing Day's reinstatement and requiring Delta to cooperate in his attempt to secure licensing from the FAA were vacated. The portion of the award ordering Delta to reimburse Day's costs in seeking rehabilitation did not contravene public policy, and, though the Court found it inconceivable that he should be entitled to parti-

cipate in Delta's alcohol rehabilitation program without having requested to enter that program, enforcement of that portion of the decision was granted.

On December 8, 1988, the Court of Appeals for the Eleventh Circuit affirmed. After reviewing specific statutory prohibitions against operating aircraft while under the influence of alcohol from 40 different states as well as federal regulations and applicable case law, the Court determined that there was a vital public policy against flying while intoxicated. Day's job performance endangering the lives of his passengers and crew offended that public policy, and Delta had a duty to prevent such conduct. The arbitration award interpreting the collective bargaining agreement between Delta and ALPA as authorizing pilots to fly while intoxicated conflicted with public policy and was unenforceable. In dicta, the Court also noted that the System Board was responsible only for determining whether Delta had just cause to terminate Day's employment, not whether his subsequent diagnosis as an alcoholic and his participation in a rehabilitation program rendered him fit for rehire. Public policy, however, did not forbid requiring that Day be reimbursed for the expenses incurred in connection with his rehabilitation, and the enforcement of that aspect of the arbitration award was therefore affirmed.

A petition for rehearing and rehearing en banc was denied on January 23, 1989.

REASONS FOR DENYING THE WRIT

The statutory and regulatory framework under which air carriers and their pilots function makes this case unique insofar as the public policy exception to

the enforcement of arbitration awards is concerned. Unlike employers in other industries whose employment relationships are governed strictly by collective bargaining agreements, Delta has a statutory obligation "to perform [its] services with the highest possible degree of safety in the public interest." 49 U.S.C. § 1421(b). In order to fulfill that obligation, a carrier must determine "the competency of its pilots in the interests of public safety taking into account such things as '*personal characteristics that could adversely affect safety.*' " *World Airways, Inc. v. International Brotherhood of Teamsters*, 578 F.2d 800, 803 (9th Cir. 1978) (quoting 14 C.F.R. § 121.413(a)(4)(ii)). In view of the responsibility imposed by federal law on air carriers to assess the abilities of particular pilots in order to ensure air safety, this is not an appropriate case for resolution of any conflicts that may exist concerning the scope of review of labor arbitration awards in other contexts.

I. The Court Below Properly Applied *Misco*

Less than two years ago, in *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987), this Court addressed the nature of the public policy exception to the enforcement of arbitration awards, and this same issue does not warrant further review. Before an award can be overturned, *Misco* reconfirmed that public policy must be "ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *W.R. Grace & Co. v. Local 759, International Union of United Rubber Workers*, 461 U.S. 757, 766 (1983) (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)). The decision of the Eleventh Circuit fully satisfies this requirement.

Rather than simply formulating its own notions of what public policy regarding air transportation ought to be, the Court below exhaustively examined existing statutes, regulations and case law in determining that a well defined and dominant policy existed forbidding piloting an aircraft while intoxicated. Forty states have passed legislation expressly prohibiting flying under the influence of alcohol, and others have outlawed reckless or dangerous flying. Criminal sanctions have been imposed in a number of reported cases against pilots found guilty of flying while intoxicated, and other decisions indicate that jeopardizing the lives of passengers and crewmembers by operating an aircraft while drunk offends public policy. As the authorities were unanimous in condemning flying under the influence of alcohol, the Eleventh Circuit, in accordance with the directives of *Misco*, found an "explicit," "well defined and dominant" public policy precluding enforcement of the arbitration award.

The only decision indicating that operating an aircraft while intoxicated is somehow consistent with public policy, *Northwest Airlines, Inc. v. Air Line Pilots Association, International*, 808 F.2d 76 (D.C. Cir. 1987), *cert. denied*, ___U.S. ___ , 108 S. Ct. 1751 (1988), predates *Misco*. That Court has not had an opportunity to reexamine the scope of the public policy exception in light of *Misco*, and its reconsideration of the issue may well eliminate any conflict among the courts.

II. The Decision Of The Court Below Does Not Conflict With Post-*Misco* Cases From Other Circuits

In determining that the portion of the System Board award mandating Day's reinstatement was unenforceable, the Eleventh Circuit carefully considered and

distinguished *Misco*. *Misco* involved an employee discovered with marijuana in his car, and his wrongdoing was not directly related to the performance of employment activities. Here, on the other hand, Day performed his job functions in a manner violative of clear and explicit laws. Requiring Delta to acquiesce in that malperformance by reinstating Day to his former position as a Pilot-In-Command was therefore contrary to public policy.

The post-*Misco* decisions from other circuits conform with this approach. Thus, an arbitration award directing the reinstatement of an employee at a federally-licensed nuclear power plant who had been discharged for defusing the interlock door system at the plant in order to go to lunch was unenforceable in *Iowa Electric Light & Power Co. v. Local Union 204, International Brotherhood of Electrical Workers*, 834 F.2d 1424 (8th Cir. 1987), while an employee who fired a gun at an empty car while off-duty had not engaged in wrongful conduct in connection with the performance of his job in *United States Postal Service v. National Association of Letter Carriers*, 839 F.2d 146 (3d Cir. 1988). Similarly, even prior to *Misco*, both the postal worker guilty of embezzling postal funds in *United States Postal Service v. American Postal Workers Union, AFL-CIO*, 736 F.2d 822 (1st Cir. 1984), and the over-the-road truck driver who was drinking on the job in *Amalgamated Meat Cutters and Butcher Workmen of North America v. Great Western Food Co.*, 712 F.2d 122 (5th Cir. 1983), committed serious criminal activities while performing their employment duties, and arbitration awards ordering their reinstatement were therefore unenforceable.

ALPA's suggestion that the Eleventh Circuit standard could authorize overturning an award reinstating a deliveryman who gets a parking ticket or any employee cited for some minor indiscretion while working is both erroneous and absurd. Only in those rare instances where an employee has committed truly egregious acts in performing his job is public policy offended by a reinstatement order. A commercial airline pilot who risked the lives of his passengers and crew by flying while drunk has engaged in the exceptional sort of outrageous behavior that offends public policy and mandates overturning the System Board award.

III. The Unique Factual Issue Created By The Arbitration Award Does Not Merit Review By This Court

By declaring that Day had committed "a dischargeable offense," the System Board satisfied its sole responsibility, determining whether Delta had just cause to terminate his employment after he had flown while drunk. Instead of resolving the dispute on that basis, however, the System Board considered Day's subsequent diagnosis and treatment for alcoholism to establish that Delta had somehow breached its collective bargaining agreement by failing to offer Day alcohol rehabilitation at the time of his discharge.

Nothing in the collective bargaining agreement the arbitrator was supposed to be interpreting created any right to treatment for alcohol-related problems. While, as ALPA notes, an arbitrator may consider evidence which mitigates against the decision of management to impose discharge as the appropriate discipline for employee misconduct, he cannot use postdischarge evidence unrelated to his function to second-guess that decision. Contrary to ALPA's sug-

gestion, nothing in *Misco* authorizes an arbitrator to expand upon the authority conferred on him by the parties by resolving issues not presented to him. Though an arbitrator is free to make evidentiary rulings without judicial review, he cannot consider matters which the parties have not agreed to have determined through arbitration.

In any event, the decision of the Court below concerning the authority of the System Board to determine whether Delta should somehow have foreseen that Day would be diagnosed to be an alcoholic and seek rehabilitation after the grievance process had been invoked is little more than dicta concerning an incidental issue in the case. The unique factual situation created by the confusing language used in the arbitration award limits any potential impact in the resolution of this question to the litigants in this action, and the Petition should therefore be denied.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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Supreme Court of the United States
OCTOBER TERM, 1989

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

DELTA AIR LINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITIONER'S REPLY BRIEF

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IN THE

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PETITIONER'S REPLY BRIEF

Petitioner respectfully submits this reply brief in support of its petition for certiorari.

1. Delta's brief in opposition argues that the court below properly applied this Court's decision in *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987) by relying on a public policy "ascertained by reference to the laws and legal precedents." Opp. at 7-8. But that is not the issue in this case. We have never challenged the existence of the public policy relied on by the court below—namely, the policy against flying while intoxicated. Nor have we ever denied that the conduct of the pilot in this case violated that policy. The question here, however, is whether the arbitrator's award—which determined that under all the circumstances discharge

was too severe a remedy—violated that or any other public policy.

Delta appears not even to understand that there is a crucial difference between the question whether the *pilot's conduct* violated public policy and the question whether the *arbitrator's award* violated public policy. This lack of understanding is illustrated by Delta's discussion of *Northwest Airlines, Inc. v. Air Line Pilots Association*, 808 F.2d 76 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1751 (1988). Delta characterizes that case as "the only decision indicating that operating an aircraft while intoxicated *is somehow consistent with public policy.*" Opp. at 8 (emphasis supplied). Obviously, that decision does not hold that flying while intoxicated is "consistent with public policy." Rather, the court merely found that no public policy problem was raised by a decision of an arbitrator reinstating a pilot who had been recertified by the FAA after treatment for alcoholism.

There is a basic difference, not only in result but in approach, between the Eleventh Circuit's decision in this case and the D.C. Circuit's decision in *Northwest Airlines*. This conflict permeates several other lower court decisions as well. For the reasons stated in the petition, we believe this conflict should be resolved by this Court.

2. Delta attempts to reconcile the conflict among the circuits by contending that the results reached in all of the cases are consistent with the rule articulated by the Eleventh Circuit in this case—that an arbitrator may not reinstate an employee whose misconduct violated a public policy that specifically related to the performance of his job duties. Opp. at 9. This formulation of the public policy doctrine, however, appears nowhere in any other decision. For example, in *United States Postal Service v. National Association of Letter Carriers*, 839 F.2d 146 (3d Cir. 1988), which Delta attempts to explain on this basis, the court assumed that there was a

public policy against the employee's work-related conduct (physical violence against a supervisor) but nevertheless determined that the policy was not violated by the award because the arbitrator found that the employee would not be aggressive in the future. On the other hand, in *Stead Motors v. Automotive Machinists Lodge, No. 1173*, 843 F.2d 357 (9th Cir.), *reh'g granted*, 857 F.2d 686 (1988), the Ninth Circuit invalidated an award even though there was no public policy regulating an employee's failure to tighten lugbolts on an automobile. Delta's theory simply does not explain the divergent results in these and other cases.

As we previously noted, the Eleventh Circuit's employment-related standard, if strictly applied, would invalidate arbitral awards any time an employee violates even the most petty work rule embodied in public policy, such as a parking violation by a truck or taxi driver. Pet. at 10. To avoid this result, Delta is forced to limit the rule by stating that "[o]nly in those rare instances where an employee has committed truly egregious acts in performing his job is public policy offended by a reinstatement order." Opp. at 10. This standard is no standard at all. It would permit every federal judge to determine what constitutes "truly egregious acts." Such a standard would eviscerate this Court's decisions restricting judicial review of labor arbitration awards.

3. Delta's argument that the "unique" regulatory and statutory framework of the Federal Aviation Act makes this case inappropriate for review by the Court is without merit. Opp. at 6-7. Contrary to Delta's protestation, there is nothing unique about the authority of labor arbitrators in the airline industry.[1] No court has ever held

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[1] The district court rejected Delta's argument on this issue. *See* App. 26a-28a. *See also Northwest Airlines*, 808 F.2d at 81 (Railway Labor Act arbitrations often implicate safety issues and no court has ruled that an arbitration board lacks jurisdiction over such issues).

that anything in the Federal Aviation Act gives the courts broader authority to review arbitration awards in the airline industry than in other industries.

In fact, the regulatory role of the FAA in pilot certification and air safety matters militates against, not in favor of, the decision below. Captain Day's fitness to fly was a matter within the jurisdiction of the FAA, not the federal courts. And once the FAA had recertified him, the issue of whether he was to be reinstated to his job at Delta was purely a matter of labor relations and collective bargaining, not a matter of public policy.[2]

4. Finally, Delta argues that the Eleventh Circuit's ruling that the arbitrator could not consider post-discharge evidence of Captain Day's alcoholism and rehabilitation is an "incidental issue in the case" not likely to affect other litigants, and therefore not worthy of consideration by this Court.[3] In fact, this is a recurring issue, for arbitrators frequently rely on post-discharge events in determining whether to reduce the penalty imposed. *See* Pet. at 12. The ruling that this is impermissible is clearly at odds both with *Misco* and the decisions of other circuits and is an independent ground for the Court's review.

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[2] In addition to the FAA's recertification of Day, its enforcement arm viewed his alcoholism and rehabilitation as mitigating when it levied a sanction for his violation of federal air regulations. Instead of issuing the usual sanction of revoking his license, the FAA issued a retroactive suspension because he was "diagnosed as an alcoholic shortly after this incident" and because of his "completion of a rehabilitation program."

[3] Delta's related argument that "[n]othing in the collective bargaining agreement . . . created any right to treatment for alcohol-related problems" is disingenuous. Opp. at 10. Although the alcohol program is not contained in the collective bargaining agreement, it was established by agreement between Delta and ALPA in a separate side letter. Accordingly, it clearly constitutes an "agreement concerning rates of pay, rules or working conditions" within the jurisdiction of the System Board. See 45 U.S.C. § 184.

CONCLUSION

For the reasons stated in the petition and in this reply brief, the writ of certiorari should be granted.

Respectfully submitted,

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